Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Benetta Buell-Wilson was injured when she lost control of her Ford Explorer and it rolled over. Although Ford had prevailed in the previous eleven cases alleging similar design defects in the Explorer, a California jury found that the vehicle was defectively designed and awarded respondent and her husband more than $368 million, including $246 million in punitive damages. The California Court of Appeal found that the jury had acted with "passion or prejudice," and reduced the awards, but upheld liability for both compensatory and punitive damages.

The questions presented are:

1. Whether California law deprives defendants of "fair notice" and thus violates the Due Process Clause if it permits the imposition of liability for punitive damages without regard to any objective indicators of reasonable conduct—including industry custom, governmental safety standards and policy judgments, and the existence of a genuine debate about what the law requires.

2. Whether, in upholding a $55 million punitive damage award and disregarding objective indicators of reasonableness and good faith in determining constitutional excessiveness, the court rendered the "reprehensibility guidepost" a nullity, by depriving it of any constraining force in product liability cases.

3. Whether the Due Process Clause prohibits using a punitive damage award to punish a manufacturer for selling products not at issue in the case or to third parties not before the court.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The plaintiffs in this case are Benetta Buell-Wilson and Barry Wilson. The defendants are Ford Motor Company and Drew Ford.

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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OTHER AUTHORITIES

Alex Berenson, *For Merck, Vioxx Paper Trail Won't Go Away*,
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David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products*,
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Jeffrey McCracken, "Big Three Face New Obstacles In Restructuring;
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Reid Hastie et al., *Looking Backward in Punitive Judgments: 20-20 Vision?*,
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Stephen Breyer, Breaking the Vicious Circle:
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W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547 (2000) 20

W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 13, 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ford Motor Company ("Ford") respectfully petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS AND ORDERS BELOW

The court of appeal's opinion (Petitioner's Appendix ("App.") 1a-61a) is reported at 141 Cal. App. 4th 525 (2006).

JURISDICTION

The court of appeal entered its judgment on July 19, 2006. The California Supreme Court denied Ford's timely petition for review on November 1, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST., amend. XIV, § 1. California's punitive damage statute, Civil Code Section 3294, is reproduced in the Appendix. *See* App. 115a-116a.

STATEMENT OF THE CASE

This Court has never examined the constitutional limits on punitive damages in the product design context, and this case presents the ideal opportunity to address three important and recurring questions that routinely arise in such cases.

The first question is whether a punitive damages statute that is interpreted to permit a manufacturer to be punished without reference to any objective indicator of reasonable conduct is unconstitutionally vague because it fails to provide "fair notice" as to how the manufacturer can conform its conduct to the law and avoid arbitrary, multimillion-dollar penalties. *See State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538

U.S. 408, 417 (2003) ("'[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment.'") (quoting *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996)). The court of appeal held that, under California law, objective measures of reasonable conduct—such as compliance with industry custom and federal safety standards and policy judgments, and a reasonable disagreement within the engineering community—had no bearing on its punitive damage inquiry, and allowed the jury to impose punishment based on its retrospective determination that Ford had miscalculated when it balanced the risks and benefits of the Explorer's design. The court's interpretation renders California law so vague as applied to product design cases that manufacturers have no idea what conduct in hindsight might be deemed "malicious" and thus subject them to punishment. This approach not only directly conflicts with numerous decisions of this Court and lower courts, but also directly interferes with federal automotive safety policy.

The second question presented is how these objective indicators and other considerations should be factored into the reprehensibility analysis for determining the constitutionally permissible *amount* of a punitive damage award. By declining to consider objective factors, the court of appeal made reprehensibility a concept without constraining force in product liability cases, as the factors the court *did* consider—such as the fact that a consumer was physically injured and that the product (like almost all products) posed known risks—will be present in almost every case. The court's approach to reprehensibility conflicts with *State Farm* and *Gore*, as well as with the approach followed by the Sixth and Ninth Circuits. *See Clark* v. *Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006); *In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006).

Finally, the third question is one that is currently before this Court in *Philip Morris USA* v. *Williams*, No. 06-1289: whether due process forbids punishing a defendant for alleged harm to third parties. Here, Ford was punished for its

sales of the Explorer—as well as the Bronco II—to third parties not before the court; therefore this Court should, at a minimum, hold this petition pending a decision in *Williams*.

1. In January 2002, respondent Benetta Buell-Wilson was driving her four-door 1997 Ford Explorer at freeway speed. App. 5a. She swerved suddenly to avoid a metal object that flew off a motor home in front of her. *Id.* Her vehicle rolled over 4 ½ times and came to rest upside down. *Id.* She suffered a severe spinal cord injury that rendered her paraplegic. *Id.* at 6a. She and her husband sued, alleging that their Explorer was "dangerously unstable and prone to rollover due to its overly narrow track width and high center of gravity" and the roof was "inadequately supported and defectively weak." *Id.* at 8a. Respondents also argued that Ford failed to warn of the alleged defects. *Id.* at 12a-14a.

Respondents' rollover defect theory was that the 1997 Explorer was "unstable and prone to rollover" because its "stability index"—a number obtained by dividing the track width of a vehicle by its center of gravity height—was too low. App. 8a-9a. Respondents' expert also claimed the Explorer's stability index was even lower than that of the Bronco II (a smaller, two-door SUV designed by Ford in 1981), and relied on a Ford document suggesting the Bronco II had a "rollover rate [that was] three times higher than the Chevy S-10 Blazer." *Id.* at 10a.

While admitting evidence concerning comparative rollover rates of other vehicles, the trial court refused to allow Ford to present such data *as to the Explorer itself.* Ford's analysis would have shown that the Explorer had a rollover rate that was much better than the Bronco II, virtually identical to the Chevrolet Blazer, and, in fact, "one of the best rollover rates compared to other SUV's in its class." App. 20a.

It was not surprising to Ford that the Explorer performed much better in the real world than simple reliance on the stability index would have predicted, because the index has long been known to be at best an incomplete predictor of rollover rates. This was not a conclusion Ford reached on its own. In

fact, the National Highway Traffic Safety Administration ("NHTSA")—the federal agency charged by Congress with regulating motor vehicle safety—has repeatedly considered whether imposing a minimum stability index is consistent with national safety policy, and has repeatedly concluded that it is not. NHTSA made this determinatic ; in part because the stability index "does not take into consideration such chassis and suspension variables as wheelbase, kinematic and compliance characteristics of suspensions, and spring and shock absorber characteristics," and in part because imposing a minimum stability index would "severely reduce the capability of utility vehicles to perform their intended off-road occupational and recreational functions." 52 Fed. Reg. 49033, 49035, 49037 (Dec. 29, 1987).

Respondents' expert agreed that design characteristics, other than those reflected in the stability index, affect stability. Reporter's Transcript ("RT") 3712-3714. As he testified, "[y]ou can't tell until you go out and test it." RT3721. But the issue of what tests to use to evaluate rollover stability has itself been a subject of substantial debate among engineers and regulators for decades. In 1988, when the Explorer was being designed, NHTSA observed that "there is no standard, accepted test or series of test procedures and performance requirements which accurately predict a vehicle's rollover propensity." 53 Fed. Reg. 34866, 34867 (Sept. 8, 1988). Since that time, NHTSA has studied numerous proposed methods of testing and evaluating vehicle handling and stability, including, among many others, J-turn, Fishhook, and Consumers Union ("CU"). *See* 67 Fed. Reg. 62528 (Oct. 7, 2002). Not until October 2003, more than eighteen months after the accident at issue and fifteen years after the Explorer was developed, did NHTSA finally conclude that "[t]he J-Turn maneuver and the Fishhook maneuver . . . were . . . the most objective tests of the susceptibility of vehicles to maneuver-induced on-road rollover." 68 Fed. Reg. 59250-59251, 59252 (Oct. 14, 2003).

In accord with its longstanding policy, Ford required the Explorer to pass the J-turn test—an extreme maneuver in

which the driver abruptly turns the steering wheel 360 degrees in one direction. RT3243, 1288. Respondents' expert agreed the J-turn is an appropriate test, RT3612, and conceded the Explorer passed it. RT3657.

NHTSA has repeatedly considered and rejected the CU test, the stability test (other than the stability index) most heavily relied on by respondents. In 1988, as the Explorer was being designed, NHTSA found that the CU test "do[es] not have a scientific basis and cannot be linked to real-world crash avoidance needs, or to actual crash data." 53 Fed. Reg. 34866, 34867 (Sept. 8, 1988). Nevertheless, CU used its test to evaluate vehicles and publish reviews based on these tests, and Ford was concerned about unfavorable publicity in the event the Explorer did not receive a satisfactory rating from CU. Appellant's Appendix ("AA") 2482. Therefore, after the Explorer had already passed the J-turn test and *all* of Ford's other internal requirements, RT3261-3262, AA2480, Ford engineers suggested four design changes that would maximize the chances that the Explorer would pass the CU test. AA2478-2481. Although, like those at NHTSA, these engineers believed that the CU test is "generally unrepresentative of [the] real world," AA2518-2519, Ford made two of the suggested four changes. AA2502.

As a result, the production model Explorer sold to consumers passed the CU test when tested by Ford, by NHTSA, and by CU itself. RT3232, 3636. Although respondents cited evidence that some prototypes failed certain tests during development, their expert admitted that when tested by NHTSA even the *least stable* production model of the Explorer passed *all four* handling and stability tests that he advocated. RT3635-36.

The respondents' Explorer had a federally-mandated warning on the visor warning consumers that the vehicle handled differently than passenger cars and that there was a risk of rolling over in sudden maneuvers. RT1723-26.

Despite the fact that the Explorer conformed to industry custom, met all federal safety standards and requirements,

passed all tests required by Ford's internal policies, and received modifications that permitted it also to pass the non-mandated CU test, the trial court allowed respondents to argue that Ford had acted with "malice" in addressing Explorer stability issues during the design process. Respondents relied principally on internal Ford documents in which engineers—not surprisingly—debated the risks and benefits of the Explorer and compared it to the Bronco II. Although the jury was not asked to and did not decide if the Bronco II was defective, respondents' counsel encouraged the jury to impose punitive damages based on Ford's design and marketing of the Bronco II, RT8172-8174, as well as the Explorer. *Id.*

Respondents also argued that punitive damages were justified because Ford knew that the Explorer's roof design posed unreasonable risks and they alleged that the roof crushed during the rollover sequence, causing Mrs. Wilson's injury. Ford, however, introduced evidence that the Explorer's roof met Federal Motor Vehicle Safety Standard 216, 49 C.F.R. § 571.216, the standard governing roof strength. RT5145, 5179.[1]

Ford also demonstrated that engineers have debated the optimal level of roof strength for decades. Ford introduced scientific studies demonstrating that increasing roof strength does not result in a reduction of injuries, because rollover injuries typically occur when the vehicle occupant is thrown into the roof prior to any "crush" occurring. RT5151-5168.

2. Over Ford's due process and state law objections, RT8128-8136, 8433-8438, 8451-8456, 8461-8462, 8475-8488, 8496-8500, the trial court gave California's standard jury instructions on punitive damages. App. 109a-114a. The court rejected Ford's proposed additional instructions that would have told the jury that "[p]unitive damages generally are not appropriate where a manufacturer has designed its

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[1] Respondents complained about Ford's testing procedure and attacked the federal standard, contending that NHTSA "has blown it on 216," RT 2404, but their expert did not test the roof. RT2533-2534.

product to meet or exceed government safety standards," and that "[p]unitive damages ordinarily cannot be awarded where the manufacturer has designed its product consistent with industry custom and practice." App. 99a-102a. The court rejected Ford's proposed instruction that punitive damages cannot be imposed to punish objectively reasonable conduct: "You may not award punitive damages if reasonable people could disagree about whether Ford's conduct was correct or lawful." *Id.* at 97a-98a. And the court refused to instruct the jury that "[i]n determining the appropriate amount of punitive damages . . . you may consider only the harm to the plaintiffs," and that "you may not consider Ford's size, wealth, [or] its overall profits and revenues." *Id.* at 103a-105a.

Before this trial, eleven Ford Explorer cases involving similar claims had gone to judgment, and in all eleven cases judgment was entered in favor of Ford. AA1154-1235. But in this case, the jury found the Explorer had stability and roof design defects, that Ford failed to warn about the roof, and that these were substantial factors in causing Mrs. Wilson's injuries. App. 79a-83a. The jury awarded Mrs. Wilson $573,348 for past economic loss, $4.032 million for future economic loss, and $105 million for non-economic loss—five times more than requested. *Id.* at 14a, 33a-34a. The jury also awarded Mr. Wilson $13 million for loss of consortium. *Id.* at 84a. The jury found by a 9-3 vote that Ford acted with "malice" warranting punitive damages. *Id.*

In the trial's second phase, respondents' counsel emphasized Ford's worldwide net worth, at the time $12.8 billion. RT8509-8511. Counsel urged the jury to act as the "conscience of our community," RT8526, and exhorted the jury to "send a direct message from society to Ford Motor Company, to Mr. Ford and to his Board of Directors and their wall panel conference room," a message "that gets the publicity." RT8508-8510. He emphasized that "our community here in California is relying on you to do the job. And that is to assess, to send the message, to help make our community safe." RT8525; *see also* RT8156-8157 (addressing "what has happened to Benetta Wilson, and others like her").

The jury then imposed $246 million in punitive damages—twice the amount respondents sought. The trial court denied JNOV but found the damages excessive. It reduced Mrs. Wilson's compensatory damages award to $70 million, Mr. Wilson's loss of consortium award to $5 million, and the punitive damages to $75 million. App. 71a.

3. The California Court of Appeal affirmed the judgment on liability for both compensatory and punitive damages. App. 4a. Although the court found "compelling evidence" that during the phase of the trial in which the jury held Ford liable for punitive damages, the jury was acting out of "passion or prejudice" and was not a "fair and neutral trier of fact," App. 35a, the court held that these defects could be cured by remitting the compensatory damages to $27.6 million and the punitive damages to $55 million. App. 4a.

In upholding liability for punitive damages, the court held that evidence that the Explorer "had one of the best rollover rates compared to other SUV's in its class" was "irrelevant" under California law, and that "admission of such evidence [would have been] reversible error." App. 20a-22a. The court declared that "compliance with industry standards or custom was irrelevant not only to the issue of defect, but also to punitive damages." *Id.* at 23a.

Nor did the court give any weight to Ford's compliance with the federal safety standards and the policy judgments of NHTSA, deciding instead that "'[g]overnmental safety standards . . . have failed to provide adequate consumer protection against the manufacture and distribution of defective products.'" *Id.* at 47a (quoting *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 810 (1981)). The court also "reject[ed] [the] contention" that the existence of a "reasonable disagreement" among engineers and safety experts over these technical and complex design judgments precluded an award of punitive damages. *Id.* at 43a. And the court rejected Ford's argument that, if punitive damages were imposed here, then California law is unconstitutionally vague as applied because there would be no objective standards by

which a manufacturer could safely judge its design decisions and avoid punishment. App. 50a.

Finally, the court rejected these same objective factors in addressing Ford's constitutional challenge to the amount of the punitive damage award, holding that "the reprehensibility of Ford's conduct was high." App. 55a. The court premised the punishment on Ford's sale of the Explorer, as well as the Bronco II, to third parties not before the court. *Id.* at 43a, 47a, 55a-57a; *see also* App. 107a-108a.

3. Ford filed a timely petition for review with the California Supreme Court arguing, among other things, that "[r]eview is . . . needed because the Court of Appeal's interpretation of section 3294 renders it unconstitutionally vague as applied in this case, both because Ford did not have notice sufficient to tailor its conduct to avoid punishment and because of the risk of arbitrary and discriminatory enforcement." Pet. for Rev. 32 n. 5. Ford further argued that the court of appeal "misinterpreted the due-process excessiveness standards governing punitive damages" by refusing "to consider key objective factors in upholding a record-setting $55 million punishment. Instead, the court relied on factors condemned by *State Farm*, such as Explorer sales to consumers not before the court, even though Ford had prevailed in the eleven prior Explorer cases." *Id.* at 5. The California Supreme Court denied review. App. 108a.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED TO CLARIFY HOW THE DUE PROCESS "FAIR NOTICE" PRINCIPLE APPLIES TO STANDARDS FOR DETERMINING PUNITIVE DAMAGE LIABILITY

The decision below upholding the jury's imposition of punitive damages flatly contravenes the Due Process Clause's prohibition on punishments based on standards that are so vague that they neither meaningfully inform the de-

fendan[illegible]what conduct is proscribed nor prevent the arbitrary infliction of punishment. While this Court's prior decisions have addressed the constitutional constraints on the *amount* of punitive damage awards, the Court has never granted review in a case to clarify what the due process "fair notice" mandate requires in the context of the threshold liability determination as to these punishments.

The Court should do so here. The ad hoc, arbitrary imposition of punitive damages based on vague and subjective standards is the root cause of the flood of huge verdicts that prompted this Court to recognize "that there are procedural and substantive constitutional limitations on these awards." *State Farm*, 538 U.S. at 416-417 (quotation marks omitted). Guidance from this Court will help stem the tide of unconstitutional punitive damage verdicts and reduce the need for courts to engage in excessiveness review.

1. "'[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment." *State Farm*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574). Indeed, the "concept of fair notice [is] the bedrock of any constitutionally fair procedure." *Lankford* v. *Idaho*, 500 U.S. 110, 121 (1991). "The Due Process Clause does not permit a State to classify arbitrariness as a virtue," and "[a] State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *State Farm*, 538 U.S at 417 (citations omitted).

While *State Farm* and *Gore* focused on the failure to provide fair notice of the *severity* of the punishment that could be imposed, the right to fair notice of the *conduct* that can give rise to punishment is even more fundamental. No matter what one might think of the Court's involvement in issues concerning the *amount* of punitive damages, the Court's concern with providing fair notice and opportunity to avoid punishment altogether has an even longer pedigree and is even more strictly enforced. As the Court put it most re-

cently in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005), "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Id.* at 703 (quotation omitted).

Moreover, the Court has made clear that "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *see also City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999) (due process requires "the kind of notice that will enable ordinary people to understand what conduct [a law] prohibits"). In addition, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-109; *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983) (law unconstitutionally vague if it fails to "establish minimal guidelines to govern law enforcement" and confers upon "policemen, prosecutors, and juries" "a standardless sweep . . . to pursue their personal predilections").

In short, a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." *Connally* v. *Gen'l Constr. Co.*, 269 U.S. 385, 391 (1926).

2. The combination of California product liability and punitive damage law, as applied here, violates these fundamental due process principles, and conflicts with decisions of this Court and other courts in analogous contexts.

a. California's standards for determining strict tort liability for defective product designs are exceedingly vague

and subjective, and by definition retrospective, with the jury setting a new safety "standard" in each case and then applying that standard to the facts at hand. California's "risk-benefit" test, which the courts applied here, empowers a jury to decide, "through hindsight," if a product design is defective by weighing, "among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." *Barker* v. *Lull Eng'g Co., Inc.*, 20 Cal. 3d 413, 431 (1978). The risk-benefit test thus "directs the jury to weigh or balance a number of factors and sets out a list of *competing* considerations for the jury to evaluate in determining the existence of a design defect." *Anderson* v. *Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 1001 (1991) (emphasis added). Once the plaintiff proves the design caused his or her injuries, California law shifts the burden to the defendant to prove that the design's benefits outweigh its risks, *Barker*, 20 Cal. 3d at 432, and the plaintiff need not prove fault.

Because this test authorizes individual lay juries to make an after-the-fact policy decision as to a complex product design, its application is necessarily unpredictable. As one commentator has observed, "[t]he very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree" and "[t]here is therefore a vast defect 'no man's land' where a manufacturer has no idea whether it is on the right or wrong side of the law. . . ." David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products*, 49 U. Chi. L. Rev. 1, 37-38 (1982).

b. Although the California punitive damage standard is theoretically capable of rational application in many circumstances, the court of appeal in this case applied the standard in a way that renders it devoid of any objective content that might provide fair notice of when punitive damages may be

imposed against a manufacturer in the murky area of product liability.[2] California Civil Code Section 3294 permits punitive damages where "it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." As relevant here, section 3294(c)(1) defines "malice" as "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." But in evaluating whether Ford acted with such malice, the court of appeal (like the trial court) dismissed as irrelevant all objective standards, including three that are widely recognized in product design cases as bearing directly on punitive damages: conformance to industry custom, compliance with federal regulations and policy judgments, and the existence of an objectively reasonable disagreement in the engineering community over the design issues in question. *See supra*, at 6-9.[3]

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[2] Ford is making an as-applied challenge, and is not arguing that the statute is unconstitutional on its face. The nature of the challenge, however, does not diminish the broad significance of the question presented, because a decision by this Court establishing the constitutional boundaries for imposition of punitive damage liability in design defect cases will serve as a due process check on hundreds—if not thousands—of such cases each year, as well as influence the manner is which punitive damage standards are applied and reviewed in countless other cases.

[3] **Industry custom**: *See, e.g., Drabik* v. *Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("Compliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind. . . ."); *Flax* v. *DaimlerChrysler Corp.*, 2006 WL 3813655, *27 (Tenn. Ct. App. Dec. 27, 2006) (vacating punitive damage verdict and observing that vehicle manufacturer's adherence to "industry customs and standards" is "relevant when determining whether [its] conduct is reckless"). **Federal safety standards**: *See, e.g., Richards* v. *Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (granting judgment on punitive damages where, inter alia, "the record demonstrates that [the manufacturer] complied with all requisite Federal Motor Vehicle Safety Standards"); *Flax*, 2006 WL 3813655, at *25 (such compliance "weighs heavily . . . against a clear and convincing finding of recklessness"); W. Page Keeton, *et al., Prosser and Keeton on the Law of Torts* § 36, at 233 n. 41 (5th ed. 1984) ("In most contexts . . .

The court's approach necessarily made it impossible for Ford to determine, in advance, if its design decisions as to the Explorer would subject it to punishment in California, and leaves Ford with no guidance as it makes day-to-day design decisions about what might subject it to punitive damages in California in the future. Section 3294 does not define what level of "safety" must be willfully and consciously disregarded to be deemed "despicable" and thus trigger punitive damage liability, and California law expressly recognizes that the design of a product inherently involves balancing safety with other legitimate concerns and that some level of danger will remain no matter what. *See, e.g., Barker*, 20 Cal. 3d at 430; *Hansen* v. *Sunnyside Prods., Inc.*, 55 Cal. App. 4th 1497, 1512 (1997) ("the test is not 'preventable danger' but 'excessive preventable danger'"); *see also* Restatement (Third) of Torts: Products Liability § 2, cmt a, at 16 (1998) ("Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved.").

If, however, no objective standards of reasonableness inform the California malice standard, as the court of appeal held, then Ford and other manufacturers "must necessarily guess at its meaning" and hope that the juries and courts will agree with them. *Connally*, 269 U.S. at 391. In fact, under the court of appeal's ruling, Ford could be punished severely simply because a single jury concludes that a single engineer

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[Footnote continued from previous page]

compliance with a statutory standard should bar liability for punitive damages."). **Reasonable disagreement**: *See, e.g., Satcher* v. *Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive award when, inter alia, "there is a genuine dispute in the scientific community" regarding reasonableness of design); *Hillrichs* v. *Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) ("an award of punitive damages is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue").

believed that the design created too much risk, even though all of the other engineers, and company executives, other manufacturers, the federal government and numerous other juries and courts disagreed. This ruling "violates the first essential of due process," *id.*, and conflicts with many decisions of this Court and other courts.[4]

For example, in *Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 490 (1915), the Court held that a $6,300 civil penalty violated due process where the defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief." The Court reached this conclusion even assuming that the defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable." *Id.*; *see also A.B. Small Co.* v. *Am. Sugar Ref. Co.*, 267 U.S. 233, 239-240 (1925) (striking down statute prohibiting "unjust, unreasonable and excessive" sugar prices as applied in civil suit because it provided no standard and "there was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute"); *Champlin Ref. Co.* v. *Corp. Comm'n of Oklahoma*, 286 U.S. 210, 242-243 (1932) (striking down statute because its "general terms" were not well defined by the common law or "shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty"); *S & H Riggers & Erectors, Inc.* v. *Occupational Safety & Health Review Comm'n*, 659 F.2d 1273, 1281 (5th Cir. 1981) (invalidating application of regulation permitting subjective evaluation of defendant's conduct without incorporating industry standards or actual knowledge requirement).

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[4] As the Solicitor General explains in a case pending before this Court, it is widely accepted that "reckless disregard in the civil context is, at bottom, *an objective standard*." Brief for the United States in Nos. 06-84 & 06-100, *Safeco Ins. Co.* v. *Burr & GEICO Gen. Ins. Co.* v. *Edo*, at 22 (emphasis added); *see also* Prosser & Keeton on the Law of Torts, § 34 at 213 ("an objective standard must of necessity in practice be applied").

In *Screws* v. *United States*, 325 U.S. 91 (1945), this Court interpreted the word "willful" to include an objective component in order to avoid this precise constitutional problem. In that case, three law enforcement officers were charged with "willfully" depriving a prisoner of his constitutional rights in violation of the precursor to 18 U.S.C. § 242. Concerned about the constitutional implications of interpreting "willfully" in a way that would permit an officer to be punished for actions that reasonable people could conclude were lawful, the Court construed "willfully" to require proof that the defendants had the "specific intent to deprive a person of a federal right *made definite* by decision or other rule of law." 325 U.S. at 97, 103 (emphasis added).

Likewise, in *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), the Court struck down a Pennsylvania statute that had been interpreted to authorize juries to impose costs of misdemeanor prosecutions on an acquitted defendant "if they [found] that his conduct, though not unlawful, [was] 'reprehensible in some respect,' 'improper,' outrageous to 'morality and justice,' . . . or that though acquitted 'his innocence may have been doubtful.'" *Id.* at 404. The Court held that, "whether labeled 'penal' or not," "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Id.* at 402-403. Because the statute as interpreted "leave[s] to the jury such broad and unlimited power in imposing costs . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is," it violated due process. *Id.* at 403-404.

And in *Connally*, the Court struck down a statute that imposed a fine and potential imprisonment for certain employers who failed to pay employees at least "the current rate of per diem wages in the locality where the work is performed." *Id.* at 388. The Court held that a punitive statute "must be so clearly expressed that the ordinary citizen can

choose, in advance, what course it is lawful for him to pursue," and that a "citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions." 269 U.S. at 392 (quoting *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, 596, 598 (1910)).

The decision below cannot be reconciled with any of these cases. Punitive damages are "quasi-criminal," *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001), and thus are subject to the same vagueness standard that governs criminal laws. *See Village of Hoffman Estates* v. *Flipside*, 455 U.S. 489, 499 (1982) (employing strict vagueness scrutiny for statute imposing quasi-criminal penalties). The court of appeal, however, interpreted California's malice standard to be utterly subjective and then applied it in a substantive area—strict product liability for design defect—that itself is subjective, retrospective, and unpredictable. Neither respondents nor the court disputed the existence of a reasonable disagreement over the design issues in this case, and the only objective benchmarks—industry custom and federal safety standards and policy determinations—support Ford's side of the debate, not respondents'. Yet, in the face of numerous decisions from other juries and courts in favor of Ford on these precise design issues, the court of appeal disregarded these objective standards and upheld a massive punishment based on a single California jury's verdict that Ford's conduct was "despicable" and in "willful and conscious disregard." The court's approach leaves juries free to impose punishment based on their own idiosyncratic "notions of what the law should be instead of what it is." *Giaccio*, 382 U.S. at 403-404. The result is that:

> the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries . . . . The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.

Connally, 269 U.S. at 395; *see also Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937) (statute unconstitutionally vague where it "licenses the jury to create its own standard in each case").

3. This question is important and recurring and deserves this Court's attention. The court below expressly declared that individual California juries are empowered, on an ad hoc, retrospective and subjective basis, to trump national automotive safety policy as determined by NHTSA because, in its view, "[g]overnmental safety standards . . . have failed to provide adequate consumer protection." App. 47a. This is a recipe for irrational safety regulation through arbitrary punishments that interferes with federal prerogatives. *See Gore*, 517 U.S. at 571 ("[O]ne State's power to impose burdens on the interstate market for automobiles is . . . subordinate to the federal power over interstate commerce"); *id.* at 573 n. 17 ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.") (citing *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 247 (1959) ("Regulation can be as effectively exerted through an award of damages as through some form of preventive relief")).

Moreover, this Court has repeatedly "admonished that 'punitive damages pose an acute danger of arbitrary deprivation of property,'" *State Farm*, 538 U.S. at 417 (citation omitted), and expressed "concerns over the imprecise manner in which punitive damages systems are administered." *Id.* The Court also has recognized that "[v]ague instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *Id.* at 418; *see also Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment) (noting that a court's failure to give the jury proper standards for imposing punitive damages "appears inconsistent with due process"); *Browning-*

Ferris Indus. of Vermont, Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring, joined by Marshall, J.) (warning of the due process dangers that arise when juries are told "little more than . . . to do what they think is best" and are thus "left largely to themselves in making this important, and potentially devastating, decision").

Punitive damages in strict liability design defect cases pose especially troubling due process issues.[5] The "advent of product liability" has been singled out as a reason for the "[r]ecent . . . explosion in the frequency and size of punitive damages awards." *Pacific Mut. Life. Ins. Co.* v. *Haslip*, 499 U.S. 1, 61-62 (1991) (O'Connor, J., dissenting).[6] And, as discussed above, the trial court rejected Ford's proposed jury instructions, which would have provided objective criteria for

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[5] The imposition of punitive damages in strict liability cases for sale of a lawful product was unknown at common law when the Fourteenth Amendment was ratified, and the court of appeal's approach here, by stripping the analysis of any objective component, is an especially radical departure from the traditional practice. *See Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415, 430 (1994) ("Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property" violated the Due Process Clause); *id.* at 436 (Scalia, J., concurring) (agreeing that by eliminating protections "traditionally accorded at common law," Oregon "violate[d] the Due Process Clause").

[6] *See, e.g.*, *Anderson* v. *General Motors Corp.*, No. BC116926 (Cal. Super. Ct., Los Angeles County) (jury award of $4.8 billion in punitive damages, subsequently reduced by trial court to $1 billion and settled on appeal); *Jimenez* v. *DaimlerChrysler Corp.*, 74 F. Supp. 2d 548 (D.S.C. 1999) ($250 million punitive damage award), *reversed for insufficiency of evidence*, 269 F.3d 439 (4th Cir. 2001); Alex Berenson, *For Merck, Vioxx Paper Trail Won't Go Away*, N.Y. Times, Aug. 21, 2005, at 1 ($229 million punitive damage award verdict (later reduced) against Merck regarding the drug Vioxx); *Estate of Mohr* v. *DaimlerChrysler Corp.*, No. CV03-2433 (Tenn. Cir. Ct. February 2005), *appeal pending* (jury award of $48 million in punitive damages in design defect case); *see also Interstate Southwest Ltd.* v. *Avco Corp.*, No. 29,385 (Tex. Dist. Ct. 2005), *appeal pending* (jury verdict of $86.4 million in punitive damages in case involving commercial dispute over cause of defect in crankshafts used in aircraft engines manufactured by the defendant).

deciding whether Ford acted with punishable malice.

Review by this Court is imperative if manufacturers are not to be subjected to arbitrary punitive damage awards based upon the whims of individual juries. To say, as the court did here, that the jury could find malice because "there is substantial evidence that Ford decision makers knew how to make the Explorer less dangerous, but chose not to because of financial considerations," App. 44a, is to place no limit whatsoever on the jury's discretion to impose punishment. That is because *all* manufacturers sell products to make a profit, *all* products can and do cause injury, and *all* design decisions reflect a balance of risks, costs, and utility. *See, e.g., Corrosion Proof Fittings* v. *E.P.A.*, 947 F.2d 1201, 1223 n. 23 (5th Cir. 1991) ("over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*").

Many products, like automobiles, by their very nature pose risks of serious injury and death that cannot be materially reduced without significant cost to society in the form of increased prices, less convenience or utility, or even less safety in other circumstances. *See generally* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 548-550 (2000). The due process problems arise because once a jury concludes that the product is defective—*i.e.*, that, by its lights, the manufacturer struck the risk-benefit balance in the wrong place—it is all too easy for the jury to take the next step and conclude the manufacturer acted with malice or conscious disregard for safety. In the absence of any objective standards, it will always be possible for a jury to conclude that the manufacturer "disregarded safety" by selling a product that it knew could be made even safer if it spent more money or sacrificed other product benefits. And empirical research shows that juries are more likely to assess punitive damages against manufacturers who have engaged in risk-benefit analysis. *Id.* at 550-551, 556-557, 589-590.

Deeply compounding the problem, jurors are confronted with deciding whether a product creates "too much risk" in the context of individual cases involving tragic personal inju-

ries, using hindsight, on the basis of a highly technical record and arcane and often conflicting opinion testimony from engineers and scientists. Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 59 (1992); *Carroll* v. *Otis Elevator Co.*, 896 F.2d 210, 215-216 (7th Cir. 1990) (Easterbrook, J., concurring) ("The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. . . . [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states."); Reid Hastie et al., *Looking Backward in Punitive Judgments: 20-20 Vision?*, in Cass R. Sunstein et al., PUNITIVE DAMAGES: HOW JURIES DECIDE 96, 108 (2002) (concluding that "hindsight bias is almost inevitable when jurors make punitive damages decisions"). Indeed, if manufacturers can be punished for selling products that reasonable people (such as the jurors in the eleven previous Explorer rollover cases) could conclude are not defective, the only way they can modify their conduct to avoid punishment is to stop selling all products that might be subject to criticism by a plaintiff's expert. *See United States* v. *Powell*, 423 U.S. 87, 93 (1975) (explaining why prohibition against charging an "unreasonable" price for sugar was unconstitutionally vague: "Engaged in a lawful business which Congress had in no way sought to proscribe, [the defendant] could not have charged any price with the confidence that it would not later be found unreasonable.") (emphasis omitted).

Product design cases thus pose a particularly high risk that juries will "use their verdicts to express biases against big businesses." *State Farm*, 538 U.S. at 417 (citation omitted). In fact, the court of appeal found that the jury in this case actually "acted out of passion or prejudice" and "was not acting as a fair and neutral trier of fact" during the same deliberation in which it found that Ford acted with malice and should be punished. App. 35a. And yet the court permitted that same jury's determination of liability for punitive

damages to stand without regard to multiple objective factors that demonstrate that Ford's conduct was objectively reasonable, not malicious. This Court should grant review and make clear that due process forbids such punishment.

II. REVIEW IS NECESSARY TO CLARIFY THE REPREHENSIBILITY GUIDEPOST IN PRODUCT LIABILITY AND PERSONAL INJURY CASES

This Court also should grant review to provide guidance on how to evaluate reprehensibility in product liability and personal injury cases. This Court's decisions in *State Farm* and *Gore* were rendered in the financial tort setting and thus the Court has not detailed the factors that should be considered in analyzing reprehensibility in product liability cases involving personal injury, in which many of the most severe and arbitrary punishments are imposed. The court of appeal's rulings not only contradict this Court's decisions in *State Farm* and *Gore*, but also conflict with the Sixth Circuit's decision in *Clark* v. *Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006), and the Ninth Circuit's decision in *In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006). If reprehensibility is properly evaluated, the necessary conclusion is that Ford's conduct was not remotely reprehensible and the $55 million punishment is grossly excessive and unconstitutional.

1. *State Farm* and *Gore* held that the due process excessiveness analysis should be conducted by reference to three guideposts: the reprehensibility of the defendant's conduct; the ratio between punitive and actual or potential damages; and the difference between the award and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418. "The[se] principles . . . must be implemented with care, to ensure both reasonableness and proportionality." *Id.* at 428.

In *Gore*, the Court stated that "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 517 U.S. at 575. "That conduct is sufficiently reprehensible

to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award." *Id.* at 580. The Court also made clear that, even in the face of a finding of malicious fraud or other conduct warranting punitive damages, the existence of "reasonable disagreement" about the lawfulness of the defendant's conduct is a factor that reduces reprehensibility. *Id.* at 579-580.

In *State Farm*, the Court emphasized the need for "exacting" *de novo* scrutiny of punitive damages under the Due Process Clause. 538 U.S. at 418. The Court stated that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* at 419. And the Court "instructed [lower] courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.*

2. The lower courts have divided over how these factors apply in design defect and other cases outside the realm of the financial torts involved in *State Farm* (insurance bad faith) and *Gore* (consumer fraud).

The court below concluded that "the reprehensibility of Ford's conduct was high, given the catastrophic nature of Mrs. Wilson's injuries, Ford's reckless disregard for the safety of others, the repeated nature of Ford's conduct, and the fact that Ford's acts were intentional." App. 55a.[7] But in

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[7] While the court purported to be applying a *de novo* standard in conducting its due process review, App. 54a-55a, the court simply adopted

reaching this conclusion, the court gave no weight to the many objective factors, such as industry custom, federal regulatory judgments, and reasonable grounds for disagreement, that significantly mitigate against any finding of reprehensibility.

This approach conflicts with the Sixth Circuit's decision in *Clark*. In *Clark*, the plaintiff was killed when his Dodge Ram pickup truck collided with a police car and his door opened during the accident and he was ejected. His estate persuaded a federal jury in Kentucky to find that Chrysler had acted with reckless disregard in designing the door because it did not perform certain strength tests on the door frame recommended by plaintiff's experts—so-called "B-pillar twist out tests." The jury imposed $3 million in punitive damages. *See* 436 F.3d at 596, 603.

The Sixth Circuit initially affirmed, but following a remand from this Court for reconsideration in light of *State Farm*, the Sixth Circuit reduced the punitive award to approximately $470,000. In its reprehensibility analysis, the court noted that while there was evidence "sufficient to support the jury's decision to award punitive damages," it "disagree[d] with the district court's decision that Chrysler's conduct is sufficiently indifferent or reckless to support a $3 million award." *Id.* at 601-602.

Contrary to the court of appeal here, the *Clark* court expressly relied on Chrysler's conformance with industry custom and federal regulations and the fact that there was "a good-faith dispute over whether such testing is necessary." *Id.* at 603. The court reasoned that, although Chrysler was allegedly aware that General Motors had engaged in such testing and "GM's test may have alerted Chrysler to the defi-

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the same extraordinarily deferential view of the evidence that it used when applying the state-law "substantial evidence" test to the jury's finding of malice. App. 56a ("As discussed *ante*, and as found by the jury . . . ."). This form of review clearly violates *State Farm*.

ciencies of its B-pillar design and prevented Mr. Clark's accident," that did not establish high reprehensibility "because the test was neither required by the government nor used by other manufacturers." *Id.* (citing *Barber* v. *Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (reversing punitive damage award based on "good faith dispute" whether the defendant's conduct violated plaintiff's rights) and *Satcher*, 52 F.3d at 1317 (vacating punitive damage award based on, inter alia, genuine dispute in scientific community over safety feature at issue)).

The Sixth Circuit also rejected the argument that the "financial vulnerability" factor supports a finding of high reprehensibility in the product design context. The court explained that, because "[i]n this case, economic injury is not involved [and] no other connection between Chrysler's financial resources and the physical injury suffered by Mr. Clark was established," the financial vulnerability "factor weighs against finding Chrysler reprehensible." 436 F.3d at 604. But the court in this case ruled directly to the contrary, declaring that "[t]he defendant's financial condition is an essential factor in fixing an amount," App. 51a,[8] and holding that the "vulnerability" factor supported a finding of high reprehensibility because the "target of the conduct in this case was consumers, individuals who were vulnerable." *Id.* at 56a. This ruling also conflicts with the Ninth Circuit's most recent ruling in the *Exxon Valdez* oil spill case. *In re Exxon Valdez*, 472 F.3d at 616-617 (explaining that for this factor to be relevant, "there must be some kind of intentional aiming or targeting of the vulnerable" and "Exxon did not intentionally target subsistence fisherman").

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[8] The California court's use of Ford's wealth at the time of trial to justify the punishment is itself irrational. While Ford had a net worth of $12.8 billion when the verdict was rendered, it *lost* $12.7 billion in 2006. *See* Jeffrey McCracken, "Big Three Face New Obstacles In Restructuring; Ford's Massive '06 Loss, GM's Accounting Woes Underscore Challenges," Wall St. J., Jan. 26, 2007, at A1.

The court of appeal's finding that Ford's conduct qualified as "intentional" and thus highly reprehensible conflicts with both *Clark* and *Exxon Valdez*. The court found that "[t]he evidence presented by the Wilsons in this case supports a finding that Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management, knowing the unreasonable risk of harm posed to consumers, as opposed to a mere accident." App. 57a. But this is a strict liability case, not an intentional tort case, and it is undisputed that Ford engineers and executives did not "intend" to injure the Wilsons or anyone else. The "evidence" of intent cited by the court is nothing more than the evidence discussed above demonstrating that Ford's engineers debated the pros and cons of various designs and tests in striking the balance between risk and utility.

The Sixth Circuit, however, rejected this approach. Even though Chrysler's design "was substantially outdated and had been removed from the modern state of the art and state of the industry for over 40 years," "B-pillar twist-out was a known failure in the automotive industry," and "Chrysler knew that if a driver was ejected, the risk of death substantially increased," the court rejected the argument that Chrysler's design decisions could be characterized as "intentional." While the court "agree[d] that Chrysler ignored potential hazards presented by a weak B-pillar," it "disagree[d] that this [intentional misconduct] factor weighs in favor of finding Chrysler's conduct reprehensible." 436 F.3d at 601, 605. The Ninth Circuit's approach in *Exxon Valdez* mirrors that of the Sixth Circuit. The court observed that, while Exxon's conduct "imposing a tremendous risk on a tremendous number of people" could not "be regarded as merely accidental," Exxon "acted with no intentional malice towards plaintiffs .... Exxon did not spill the oil on purpose." 472 F.3d at 618, 631 n.6. The "conduct did not result in any intentional damage to anyone," and this factor "militates against viewing Exxon's misconduct as highly reprehensible." *Id.* at 618.

Finally, the California court's holding that Ford's conduct was "more reprehensible" because it was "repeated and not an isolated incident," App. 56a-57a, also conflicts with *Clark*. While Ford *won* the eleven prior trials alleging the same defects in the Explorer—and then won two victories during the trial below and additional victories since[9]—the court ruled that Ford's conduct was "repeated." *Id.* But the Sixth Circuit rejected this argument: "The district court also held that Chrysler's conduct was not isolated because . . . Chrysler put anyone who drove a Dodge Ram pickup truck at risk. Because there is no evidence that Chrysler repeatedly engaged in misconduct while knowing or suspecting that it was unlawful, we conclude to the contrary." 436 F.3d at 604; *see also* Part III *infra*.

3. The court of appeal's approach "make[s] 'reprehensibility' a concept without constraining force," *Gore*, 517 U.S. at 590 (Breyer, J., concurring),[10] and contradicts this Court's decision in *Gore*. In *Gore*, the jury found that the defendant's policy with respect to the disclosure of factory repairs constituted "'gross, oppressive, or malicious' fraud" even though that policy was consistent with statutes defining disclosure obligations in about 25 States. 517 U.S. at 565. Alabama had no such disclosure statute, and this Court "accept[ed] . . . the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate." 517 U.S. at 579-580. Nevertheless, this Court recognized that BMW, in attempting to determine what it was required

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9 *See, e.g.*, *Shatz* v. *Ford Motor Co.*, 412 F. Supp. 2d 581 (N.D. W. Va. 2006) (jury verdict in Ford's favor); *Davis* v. *Ford Motor Co.*, No. Civ. A. 302CV271LN, 2006 WL 83500 (D. Miss. Jan. 11, 2006) (mem. op.) (judgment as a matter of law in Ford's favor); *cf. Jaramillo* v. *Ford Motor Co.*, 116 Fed. Appx. 76 (9th Cir. 2004) (initial jury verdict in favor of Ford reversed and remanded for new trial).

10 *See also TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 480-481 (1993) (O'Connor, J., dissenting) ("[w]ithout objective criteria on which to rely, almost any decision regarding proportionality will be a matter of personal preference") (citation omitted); *Haslip*, 499 U.S. at 23 (affirming punitive damages where they "did not lack objective criteria").

to disclose, "could reasonably rely on [other] state . . . statutes for guidance." *Id.* at 579. The Court also noted that the "diversity" of state laws "demonstrates that reasonable people may disagree about the value of a full disclosure requirement." *Id.* at 570. The Court concluded that a failure to disclose is "less reprehensible . . . when there is a good-faith basis for believing that no duty to disclose exists," *id.* at 579-580, and when "a corporate executive could reasonably interpret" the law to allow nondisclosure. *Id.* at 578.

This same analysis is equally applicable in product liability cases. Even if *some* amount of punitive damages can be imposed because respondents' paid experts disagree with Ford—and with Ford's experts, the federal government, the entire motor vehicle industry concerning stability and roof design, and many other juries—the existence of grounds for reasonable people to disagree on this issue is surely *relevant* to the reprehensibility analysis, just as the state disclosure statutes were relevant to that issue in *Gore*. But the court below simply disregarded these and all other objective indicators of good faith and reasonableness in branding Ford's design decisions highly reprehensible.

This Court should grant review because meaningful application of the reprehensibility guidepost is crucial in product liability cases. As this case shows, such cases often produce very substantial compensatory damage verdicts, including large non-economic damage awards for pain and suffering and emotional distress. Absent careful and objective scrutiny of reprehensibility, even a 1:1 or 2:1 ratio between punitive and actual damages can result in a "a punitive sanction that is tantamount to a severe criminal penalty," *Gore*, 517 U.S. at 585, and unconstitutional.

III. AT A MINIMUM, THIS COURT SHOULD HOLD THIS PETITION PENDING ITS DECISION IN *PHILIP MORRIS* V. *WILLIAMS*.

Philip Morris USA v. *Williams*, No. 06-1289, presents the question whether the Oregon courts improperly punished Philip Morris for allegedly causing harm to third parties not

before the courts in that case. That issue is squarely, and quite graphically, presented in this case.

Ford filed a motion *in limine* to bar any punitive damage evidence or argument that did not relate to conduct that caused injury to respondents (Motion in Limine No. 31), and a separate motion to exclude the Bronco II evidence. Respondents' Appendix 12-17; RT82-89. The court denied that motion, but granted Ford a standing objection. RT629. At trial, respondents focused extensively on the Bronco II, attacking the Bronco II's design in their opening and closing arguments, and spending the better part of several days examining witnesses about it. *See, e.g.*, RT662-690, 1247-1251, 1269-1272, 1274-1275, 2858-2880, 2887-2893, 2906-2909, 2991-2996, 8169-8174, 8508-8509. And they encouraged the jury to impose punitive damages based on the Bronco II. RT8172-8174.

Although Ford asked that the jury be instructed that "[i]n determining the appropriate amount of punitive damages . . . you may consider only the harm to the plaintiffs," App. 103a, the court denied the instruction, RT8497-8498, and the jury imposed $246 million in punitive damages. Respondents acknowledge that the award was based in part on Ford's sale of supposedly "other defective vehicles," including the Bronco II and the Pinto. App. 107a. As there is no allegation that respondents were harmed by the Bronco II or the Pinto, there can be no dispute that the jury and the court below punished Ford for alleged harm to third parties. Yet the court rejected Ford's arguments that due process precluded the imposition of punitive damages for its sale of the Bronco II or for otherwise allegedly harming third parties. App. 56a-57a.

Moreover, to the extent it assumed that every sale of the Explorer is an example of "repeated" misconduct the court effectively nullified Ford's many prior victories in Explorer cases, and inflicted punishment based on conduct exonerated by other juries. The court has also subjected Ford to the threat of duplicative punishment in future cases that rely on the same supposed "repeated" conduct to impose additional

punitive damages for marketing the Explorer. *See State Farm*, 538 U.S. at 423.

Accordingly, this Court should, at a minimum, hold this petition pending the decision in *Williams*.

CONCLUSION

The Court should grant certiorari and set this case for plenary consideration, or, in the alternative, hold this petition pending its decision in *Williams*.

Respectfully submitted.

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January 30, 2007

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APPENDIX A

BENETTA BUELL-WILSON et al.,
Plaintiffs and Respondents,
v.
FORD MOTOR COMPANY et al.,
Defendants and Appellants.

D045154, D045579

COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT,
DIVISION ONE

141 Cal. App. 4th 525;
46 Cal. Rptr. 3d 147;
2006 Cal. App. LEXIS 1089;
2006 Cal. Daily Op. Service 6512;
2006 Daily Journal DAR 9367

July 19, 2006, Filed

COUNSEL: Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., William E. Thomson, Eileen M. Ahern, Theodore B. Olson and Paul DeCamp for Defendants and Appellants.

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Mayer, Brown, Rowe & Maw and Donald M. Falk for The Product Liability Advisory Council, Inc., as Amicus Curiae on behalf of Defendants and Appellants.

O'Melveny & Myers, Brian D. Boyle, Matthew M. Shors, Charles E. Borden and Arthur W. S. Duff for The Alliance of Automobile Manufacturers as Amicus Curiae on behalf of Defendants and Appellants.

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Jerome B. Falk, Jr., Steven L. Mayer, Keith D. Kessler; Hancock, Rothert & Bunshoft, Paul D. Nelson, Paul J. Killion, Jacqueline G. Elliopulos, Leslie Kurshan, Michael J. Dickman; Schoville & Arnell, Dennis A. Schoville, Louis G. Arnell and James S. Iagmin for Plaintiffs and Respondents.

JUDGES:
Nares, J., with McConnell, P. J.,
and Irion, J., concurring.

OPINION BY: Nares

OPINION: NARES, J.—Benetta Buell-Wilson (Mrs. Wilson) brought this action against Ford Motor Company (Ford) and Drew Ford (Drew)[1] as a result of the rollover and roof crush of her Ford Explorer (Explorer) that left her a paraplegic. Mrs. Wilson's husband Barry Wilson (Mr. Wilson) brought a claim for loss of consortium against Ford and Drew. A jury found in favor of Mrs. Wilson and Mr. Wilson (together the Wilsons), finding that (1) the Explorer was defectively unstable; (2) the Explorer was not crashworthy due to a defect in the roof; (3) Drew failed to warn the Wilsons that the Explorer was defectively unstable; and (4) Ford and Drew failed to warn the Wilsons of the danger posed by the defect in the roof. The jury awarded Mrs. Wilson $109,606,004 in damages for her injuries,

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[1] Ford Motor Company refers to itself and Drew Ford collectively as "Ford," except where necessary to distinguish between the two. Accordingly, we do the same in this opinion.

consisting of $4,606,004 in economic damages and $105 million in noneconomic damages, and awarded Mr. Wilson $13 million for his loss of consortium. The jury also found that Ford acted with "oppression, fraud or malice" and awarded the Wilsons $246 million in punitive damages. The court later reduced Mrs. Wilson's total compensatory damages award to $70 million, resulting in an award of $4,606,004 in economic damages and $65,393,996 in noneconomic damages. The court reduced Mr. Wilson's loss of consortium damages to $5 million. The court reduced the punitive damages award to $75 million, a one-to-one ratio to the Wilsons' total reduced award of compensatory damages.

On appeal Ford asserts (1) it is entitled to a new trial because the court erroneously admitted evidence about stability problems with a predecessor vehicle, the Ford Bronco II (Bronco II), and erroneously excluded evidence of the Explorer's "real-world" safety record and comparative data; (2) the noneconomic portion of the compensatory damages award was excessive and an unconstitutional violation of Ford's due process rights; (3) punitive damages were improperly awarded because (a) at most the Wilsons proved that "reasonable people could disagree regarding" the design decisions Ford made, and (b) California's punitive damages law is unconstitutionally vague as applied; and (4) the punitive damages award was excessive and the product of improper considerations. We granted permission to The Chamber of Commerce of the United States of America (the Chamber), The Alliance of Automobile Manufacturers (AAM) and The Product Liability Advisory

Council, Inc. (PLAC), to file amicus curiae briefs to support Ford's contentions on appeal.[2]

We hold that (1) the award of noneconomic damages to Mrs. Wilson, as reduced by the trial court, is excessive under California law, is the product of "passion or prejudice," and must be reduced to $18 million; (2) the reduced award for loss of consortium in the amount of $5 million is reasonable and is affirmed; and (3) the award of punitive damages is excessive, violates federal due process limitations, and must be reduced to $55 million, a ratio of approximately two to one to the total compensatory damage award, after our reduction, of $27,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million for loss of consortium). We issue a remittitur conditioning affirmance of the judgment on the Wilsons' agreement to those reductions. Thus, if the Wilsons accept the remittitur, the total judgment will be reduced to $82,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium + $55 million in punitive damages). We reject the remainder of the arguments made by Ford and amici curiae.[3]

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[2] Ford separately appealed the underlying judgment and the court's rulings on posttrial motions. On January 26, 2005, by stipulation of the parties, these two appeals were ordered consolidated.

[3] The Wilsons also appealed the judgment, but have voluntarily dismissed their appeal. Following briefing in this matter, the Wilsons filed a motion to strike allegedly false statements made in Ford's reply brief. We ordered the motion considered concurrently with the appeal. We deny the motion to strike, but note that in resolving this appeal we have not considered any statements that are not supported by the record. The Wilsons filed a motion for judicial notice, requesting that we take judicial notice of the legislative history of the

[Footnote continued on next page]

FACTUAL AND PROCEDURAL BACKGROUND

A. The Accident

At around 5:00 p.m. on January 19, 2002, Mrs. Wilson, a married 46-year-old graduate student and mother of two, was driving her 1997 four-door Explorer within the speed limit on Interstate 8 near Alpine, California. The road was dry and sloped slightly downhill.

Suddenly, Mrs. Wilson saw what appeared to be a metal object break loose from a motor home in front of her and bounce directly toward her windshield. As she swerved to avoid the object, the wheels on the passenger side lifted from the road, and the Explorer went out of control. The vehicle fishtailed multiple times across lanes and rolled four and a half times, coming to rest on its roof on the road's shoulder. Ford conceded at trial that Mrs. Wilson bore no fault for the accident.

As the Explorer rolled, the roof's pillars and rails crumpled, and the roof crushed down more than 10 inches, causing severe injuries to Mrs. Wilson. Inside the vehicle, she hung upside down from her seatbelt, in "crushing . . . unbelievable pain," gasping for breath and feeling as if her life were fading away. Motorists stopped to assist and struggled to flip the vehicle, and rescue crews cut the roof open to remove her. An ambulance took her from the scene to a life flight helicopter, which flew her to Sharp Memorial Hospital (Sharp) trauma center.

B. Mrs. Wilson's Injuries

[Footnote continued from previous page]

1987 amendment to Civil Code section 3294, as well as portions of the legislative histories for unenacted Assembly Bill No. 2880, unenacted Assembly Bill No. 2582, and pending Senate Bill No. 1429. We grant this unopposed request.

1. Physical injuries

The compressive forces from the collapsing roof fractured and severed Mrs. Wilson's spine at the T12 level, where the thoracic and lumbar regions meet. She will never recover sensation or function below the level of that injury. She also suffered facial injuries, fractured ribs, a cut spleen that caused internal bleeding, a fractured leg and torn PCL and ACL ligaments in both knees, causing bilateral knee dislocations.

In addition to the vertebral fractures, the spinal sac was damaged, causing leaking of cerebral spinal fluid, and portions of the spinal cord and nerve root were pulverized. Doctors inserted metal screws and rods into her back to stabilize her upper body. After almost two weeks, she was transferred to Sharp's rehabilitation center, where she spent another two and a half months.

Mrs. Wilson's resulting paraplegia ended her active life and forced her to painfully relearn basic aspects of daily living, some of which she will never regain. She lives in severe and constant pain that will increase over time. Her accident left her with no sensation from the waist down, except "phantom pain"—a constant burning sensation below her ribs. Above her waist, she suffers constant pain, feels painful pressure on her ribs from the rods in her back, and has intermittent spasms of stabbing pain.

Medication can provide temporary pain relief, but the strong medication needed has serious side effects. It causes her to lose alertness, which makes it impossible to drive. It interferes with her ability to communicate socially. It makes her unsteady in her wheelchair. She also runs the risk of becoming addicted to the medication. There is a constant conflict between efforts to reduce her pain and the debilitating side effects of the medicine itself.

The spinal injury caused a total loss of bladder and bowel control. She must now catheterize herself multiple times daily. Her feces must be manually extracted. In addition to the emotional pain and humiliation from losing control over her bodily functions, she suffers recurring urinary tract infections, which expose her to a potentially fatal kidney disease. Mrs. Wilson is allergic to commonly prescribed medications, including sulfa and penicillin, and her chronic use of antibiotics to fight infections has caused resistance to other drugs.

Mrs. Wilson also suffers severe bruising, which takes months to heal due to diminished circulation in her lower body. Her feet swell and are susceptible to cracking and bleeding. The constant grinding of her shoulder joints from wheeling her wheelchair has caused shoulder problems, which will worsen over time. She suffers disfigurement, with one leg smaller than the other and large surgical scars across her back.

2. Mental and emotional injuries

Before the accident, Mrs. Wilson was an active, athletic, outdoors woman, with a black belt in martial arts. She often camped and hiked with her family, backpacked with Girl and Boy Scouts, helped with the San Diego Tracking Team, and did projects at Mission Trails Regional Park. She and her husband took dancing lessons, traveled and took walks.

She no longer can engage in any of the active lifestyle she once enjoyed, including swimming, skiing, snowboarding, dancing, backpacking and walking. Mrs. Wilson was finishing her masters degree in education and was about to start a second career as a teacher. These plans also have been indefinitely delayed and it is unclear whether they are now possible.

Mrs. Wilson is unable to visit all the rooms in her home—including her own bedroom—because they are

inaccessible to her. She and Mr. Wilson must sleep in their laundry room.

She has changed from a giving, enthusiastic, independent person who took joy in aiding others, to being dependent on others for almost every aspect of her life. Her husband and children are now her caregivers.

C. Mr. Wilson's Loss of Consortium

The injuries to his wife dramatically changed Mr. Wilson's life as well. The Wilsons no longer share the physical relationship they had prior to the accident. Instead, he is now her caregiver and must assist her with the most personal of care, including showering and catheterizing her. He assists her in transferring in and out of her wheelchair and worries that she may fall if she tries to transfer on her own. Several times per night, he wakes to turn his wife over in bed so that she will not get bedsores.

Mr. Wilson has had to decrease his work schedule as an attorney to assist his wife during the day and accompany her to medical appointments and therapy. He performs the household work that his wife can no longer do. The Wilsons spend most of their time trying to accomplish the mundane chores of daily life. Every day Mr. Wilson shares his wife's constant pain, frustration and anxiety in living with her injuries.

D. The Explorer's Defects

The Wilsons submitted evidence at trial that the accident and resulting injuries were caused by two independent defects in the 1997 Explorer. They established that the Explorer's design was dangerously unstable and prone to rollover due to its overly narrow track width and high center of gravity. They also established that the Explorer's roof was inadequately supported and defectively weak, so that it readily crushed into the passenger compartment when subjected to the forces inherent in a foreseeable rollover.

Ford has not challenged on appeal the sufficiency of the evidence supporting the jury's finding that the Explorer was defective on either of these grounds.[4] We therefore review the evidence in the light most favorable to the judgment, disregarding contrary evidence submitted by Ford. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053 [68 Cal.Rptr.2d 758, 946 P.2d 427].)

1. Stability defects

Long before the Wilsons purchased their Explorer, Ford's engineers knew that the vehicle's design was unstable and prone to rollover in emergency maneuvers due to its high center of gravity and narrow track width. Ford had known for decades the importance of vehicle stability in emergency maneuvers. It knew that on flat, dry pavement, a car or truck should slide out, rather than roll.

The Explorer was derived from the Bronco II and evidence of its development history was presented to the jury to show them how and why the Explorer's instability defect came to exist. In 1981, two years before the Bronco II's introduction, Ford measured the stability index (SI) of its competitor, the Jeep CJ7, which had a widely reported rollover problem. The SI is the average of front and rear track width, divided by the center of gravity height. The higher the SI rating (*i.e.*, the wider the track and lower the center of gravity), the more stable the vehicle. The Jeep's SI was 2.04. The Bronco II's SI was less, measuring 1.86. The Bronco II was so unstable it would roll over at only 30 mph on Ford's test track. Ford engineers proposed improving its stability

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[4] Ford does assert that the court erroneously admitted evidence that supported the jury's finding on liability and erroneously excluded evidence that supported its defense. However, as is discussed, post, those evidentiary rulings were not an abuse of discretion.

index by widening its track width. Because doing so would have delayed the vehicle's release date and impacted profits, that proposal was rejected by management.

Ford knew that people were being seriously injured in Bronco II rollovers when the Explorer was being developed. In April 1989, a year before the Explorer release date, Ford executives objected to and tried to stop the release of a damaging Consumer Reports article on Bronco II instability.

Regarding these efforts, Jerry L. Sloan of Ford's public affairs office wrote: "We think going in we were in deep trouble regarding our rollover rates . . . . [¶] . . . Our rollover rate is three times higher than the Chevy S-10 Blazer. . . . [T]he [Fatality Analysis Reporting System (FARS)] data put us in a bad light. . . . [¶] . . . [¶] We think, however, that we have clouded their minds . . . ."

Instead of making design improvements in stability for the Explorer, Ford utilized the Bronco II platform. The Explorer had almost exactly the same track width, high engine mount and elevated center of gravity as the Bronco II, which caused the same instability problems. Over half the parts for the four-door and 80 percent for the two-door Explorer were carried over from the Bronco II.

Ford's design engineers repeatedly requested Ford to widen the track width and lower the center of gravity on the Explorer to increase its stability. However, management declined to do so. As acknowledged by Robert Simpson, a program manager for the development of the Explorer, this was because of "the . . . investment that Ford had sunk into the Explorer," and, as the Wilsons' expert, Dr. David Renfroe, explained, it was also because its "directive was to meet Job 1 [the release date]." Dr. Renfroe also explained that "the engineers were proposing to make [stability index] changes to be consistent with their standards and they were prevented from doing that by the management."

Unable to pass the Consumers Union on-track stability test because the Explorer was rolling over at under 45 miles per hour, Ford resorted to using computer simulations to show the vehicle's safety. Ford claimed the validation data for its computer results did not exist, precluding an expert from determining whether the Explorer actually passed the computer tests. The Explorer did pass the Consumers Union short course test, but that test was designed to measure its handling, not stability.

The Explorer's instability was increased by Ford management's decision to utilize P235 tires that further raised the center of gravity, instead of the P215 tires specified and requested by its engineers to provide greater stability. Based upon his review of Ford internal documents, the Wilsons' expert, Dr. Renfroe, testified that Ford "knew when they made that decision that the vehicle was going to be more unstable and more likely to rollover in an accident avoidance maneuver, and they were . . . willing to accept the risk and take it to court, if necessary." Ford chose larger tires to fill a cosmetic gap between the wheel well and tire in order to present a more "robust" look. Ford's own analysis showed that Explorers equipped with P235 tires would have an SI of 2.08, less than the then-current 1987 Bronco II's SI of 2.15. With the P235 tires, the Explorer failed basic J-turn stability tests.

In 1988 a Firestone engineer, who was working with Ford to analyze the stability effect of different tire sizes on the prototype Explorer, wrote to Ford complaining about the vehicle's inherent instability: "Most importantly, the vehicle still has [two-]wheel lift no matter what tire is on it, 225/70, 215/75 or 205/75. So you're kidding yourself if anyone thinks going back to a base tire of 215/75 is going to solve anything."

Unable to pass stability tests with P235 tires, Ford executives in 1989 considered releasing the four-door

Explorer on P225 tires in order to pass the Consumers Union test. Later, if the Explorer passed the test, Ford could release the vehicles with P235 tires, consistent with its marketing plan. In an internal Ford e-mail, this was referred to as a "strawman" that would "assure good performance in the [Consumers Union] Test and minimize any adverse Public Relations risk." Ford's decision to accept the risk of using the P235 tires is shown in an internal e-mail from Ford employee Roger Stornant to Charles White, a senior design engineer for the Ford Explorer: "OGC [the office of general counsel] is concerned we will be the only OEM [original equipment manufacturer] with a vehicle that has a significant chance of failing the CU [Consumers Union] test. I believe that management is aware of the potential risk w/P235 tires and has accepted risk."

Instead of using smaller tires, Ford executives decided in February 1989 to underinflate the P235 and P245 tires to 26 pounds per square inch (psi), as opposed to the tire's specification of 35 psi. Explorer owners were not informed of the need to underinflate the tires, nor were they told they were exposed to the risk of a rollover by complying with the tire's higher inflation specifications.

Ford had an opportunity to improve the Explorer's stability when it changed its suspension design for the 1995-1998 models. But again financial considerations prevailed and, according to a 1990 internal Ford document, Ford decided "not [to] take advantage of the fact that the engine could be lowered with a[n] SLA[5] type suspension. This decision was driven by early implementation and program cost." As a result, the Wilsons' 1997 Explorer was no more

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5 "SLA" is short for "short/long arm" suspension, also known as "double wishbone" suspension.

stable than the original model or its prototypes. According to the Wilsons' experts, the Explorer's inherent instability caused it to roll in response to Mrs. Wilson's emergency avoidance maneuver, resulting in her injuries.

2. Roof strength defect

As Mrs. Wilson's Explorer rolled, the roof crushed nearly a foot into the passenger compartment. The Wilsons' biomechanical expert, Dr. Anthony Sances, testified that Mrs. Wilson's spinal injury was caused by 1,000 to 2,000 pounds of force crushing down onto her shoulder. Dr. Frank Coufal, her neurosurgeon, confirmed that compressive force caused the spinal injury. The Wilsons' experts testified that a stronger roof would not have crushed and would have prevented Mrs. Wilson's injuries.

The Wilsons presented evidence that rollovers are relatively nonviolent events for the occupants when they are properly restrained and there is minimal roof intrusion, and occupants are killed or disabled only when the roof crushes inward.

The Wilsons also presented testimony from their engineering expert Stephen Forrest as to why the Explorer's roof was defectively weak. The evidence showed that Ford could have provided the Explorer with a roof that would not have crushed by using high strength steel, adding reinforcements, eliminating open sections such as the depressed weld groove, eliminating holes and/or using foam filling. Ford had used safer closed section front headers in other vehicles. These modifications would have cost about $20 per vehicle.

3. Ford and Drew's failure to warn the Wilsons of the defects

The Wilsons testified that Ford and Drew did not provide notice of the Explorer's roof crush risk. The Wilsons also submitted evidence that Drew failed to warn them of the

instability danger posed by inflating the P235 tires to the tire manufacturer's recommended psi. Drew did not disclose that their Explorer was equipped with larger LT235 tires instead of smaller P225 or P215 tires, nor that underinflation was required for the larger tires. The salesmen at Drew were unaware of an underinflation requirement. Although Ford directed its dealers to use no more than 26 psi in P235 tires, Drew never warned the Wilsons of this fact. Because of this, the Wilsons never knew to instruct attendants to underinflate the tires below the specified 35 psi when the vehicle was serviced.

The Wilsons testified they never would have bought the Explorer if the rollover and tire pressure risks had been disclosed.

E. Trial and Jury Verdict

The jury deliberated for five days before reaching a verdict. It found nine to three that the Explorer had a stability design defect which was a substantial factor in causing the Wilsons' injuries. The jury found 11 to one that there was a crashworthiness design defect in the roof and that this defect was also a substantial factor in their injuries.

As to Drew, the jury found 10 to two that it failed to warn the Wilsons of the stability defect. They found in favor of Ford on this count. The jury found 10 to two that both Ford and Drew failed to warn the Wilsons of the Explorer's crashworthiness defect.

The jury awarded Mrs. Wilson $573,348 for past economic loss, $4,032,656 for future economic loss, $6 million for past noneconomic loss and $99 million for future noneconomic loss.

The jury found nine to three that Ford acted with oppression, fraud or malice. The court's poll of the jury confirmed each juror had found fraud, malice or oppression by clear and convincing evidence.

In a separate phase of trial, the parties presented evidence and arguments on punitive damages. During closing argument, counsel for Ford said: "It's impossible not to be angry at Ford, Ford Motor Company, for what decisions that in marketing and selling this Ford Explorer it knowingly put a defective product out on the market [*sic*] and caused the family tragedy that you see before you now. . . . [¶] . . . [¶] . . . We are sorry. I don't think—I know it rings hollow, but I am going to say it anyway. We are sorry. We are sorry that we let you down. The engineers are sorry that they let the rest of the company down."

The jury awarded $246 million in punitive damages.

F. Posttrial Motions and Judgment

Ford filed motions for new trial and judgment notwithstanding the verdict (JNOV).

The JNOV motion attacked the evidence supporting the punitive damages award. The court reexamined the evidence and concluded that the Wilsons had met their burden of producing clear and convincing evidence that Ford acted with malice, a conscious disregard for safety, and engaged in despicable conduct.

Ford's motion for new trial challenged the size of the compensatory and punitive damages award. The court found "the damages awarded are excessive," but also stated, "The Court does not find that the jury rendered its verdict due to passion or prejudice." The court conditionally granted a new trial unless the Wilsons consented to a reduction of Mrs. Wilson's compensatory damages award to $70 million, Mr. Wilson's loss of consortium award to $5 million and the punitive damages award to $75 million. Subtracting the jury's award of economic damages in the amount of $4,606,004, the court's remittitur left Mrs. Wilson with an award of noneconomic damages in the amount of $65,393,996.

In assessing the propriety of the amount of compensatory damages awarded to Mrs. Wilson, the court stated: "The evidence, in the Court's opinion, is insufficient to support a compensatory damage verdict in favor of [Mrs. Wilson] in the amount of $109,606,004. In reaching that finding and the other findings on the verdict on damages, the Court has weighed the evidence, including reasonable inferences therefrom, and is convinced from the entire record the jury clearly should have reached a different verdict on damages. That same evidence, however, . . . is sufficient to support a compensatory damage award in favor of [Mrs. Wilson] in the amount of [$70 million]."

In assessing the proper amount of punitive damages to be awarded the court stated: "In considering these factors, the evidence showed Ford had a pattern of deficient design regarding safety in favor of increased financial returns and was a result of the conscious disregard of Ford executives. That evidence was primarily adduced through Ford's own internal memoranda and correspondence. This conduct was reprehensible and weighs in favor of punitive damages. The remittitur reduces the punitive damage award to a one-to-one ratio relative to the compensatory award. This is well within the second guidepost set forth by the Supreme Court. Even as reduced, the compensatory damage award is large. When compensatory awards are substantial, a ratio of [punitive damages] equal to the compensatory damages is within the limits of the due process guarantee. [Citation.] The punitive damages are fair and reasonable and proportionate to the amount of harm suffered by the [Wilsons]."

The Wilsons accepted the remittitur and an amended judgment was entered on September 3, 2004. Ford's timely appeals followed.

ARGUMENT

I. EVIDENTIARY ISSUES

A. Bronco II Evidence

Ford asserts it is entitled to a new trial because the trial court erroneously admitted evidence regarding the Bronco II vehicle. This contention is unavailing.

1. Background

Ford contends the court erred in denying its motion in limine that sought to exclude as irrelevant "all evidence relating to the Bronco II and Ford's decision to cease manufacture of the Bronco II." In response, the Wilsons submitted evidence that the Explorer's relevant design characteristics were derived from the Bronco II and that Ford had knowledge of the rollover risk posed by that design.

The trial court denied Ford's motion, finding the Explorer's development was "intimately tied" to the Bronco II's development, as shown by Ford's internal documents.

Ford's motion for new trial asserted the court erred by allowing evidence of the Bronco II. The court rejected this argument, finding that the Wilsons "presented substantial evidence of the design carry-over from the Bronco II to the Explorer, evidence of the intermingling of the development and testing of the Bronco II and the Explorer and the similar source of rollover problems between the Bronco II and Explorer for the Court to find the two vehicles are substantially similar."

2. Analysis

"'Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.' " (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900 [122 Cal. Rptr. 2d 802].) " ' "The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the

trial court of its discretionary power." ' " (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815 [42 Cal. Rptr. 2d 459].)

The court did not abuse its discretion in admitting evidence of similar design flaws in the Bronco II to those alleged to be at fault in the Explorer. The Wilsons' expert, Dr. Renfroe, testified that the Explorer and the Bronco II shared the specific dangerous design characteristics that created instability. In fact, it would have been impossible not to have evidence on the similarities of the Explorer and Bronco II's stability characteristics as Ford itself assessed the stability of the Explorer by comparison to the Bronco II.

Ford asserts that it was error to introduce evidence of the Bronco II because they were different vehicles, citing many differences in design. However, the evidence went to similarities in a particular design flaw, not the vehicles as a whole.

Where a plaintiff intends to adduce evidence of the functioning of related products to prove that the product in question was defective, identical conditions need not be present between the two systems. Substantial similarity is sufficient. (*See Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 403-404 [185 Cal. Rptr. 654, 650 P.2d 1171] (*Hasson*), disapproved on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574 [34 Cal. Rptr. 2d 607, 882 P.2d 298].) Thus, in an action against an automobile manufacturer to recover for damages arising out of an automobile accident caused by brake failure in a 1966 model vehicle, the California Supreme Court held that the trial court had reasonable basis for admitting evidence of numerous failures occurring in 1965 models for the purpose of showing that 1966 models were similarly defective even if plaintiffs did not prove that the 1965 system was exactly the same as the 1966 system. (*Hasson, supra,* 32 Cal.3d at pp. 403-404.)

Ford argues that the Explorer's and Bronco II's stability characteristics were not sufficiently similar to allow the evidence concerning the Bronco II. The trial judge in the first instance must determine if the design characteristics are sufficiently similar. (*Hasson*, *supra*, 32 Cal.3d at p. 404.) As discussed, *ante*, the court found that the Bronco II's and Explorer's relevant design characteristics were substantially similar, and we must give substantial deference to that finding. (See *Bado-Santana v. Ford Motor Co.* (D.P.R. 2005) 364 F. Supp. 2d 79, 92-94 [in rollover case involving Ford Explorer, court denied Ford's motion in limine to exclude evidence of design and development history of Bronco II as too dissimilar to Explorer, finding such evidence relevant to Ford's knowledge of and failure to correct stability design flaws].)

Moreover, "[w]hen evidence is offered to show only that defendant had notice of a dangerous condition, the requirement of similarity of circumstances is relaxed: ' "[A]ll that is required . . . is that the previous injury should be such as to attract the defendant's attention to the dangerous situation." ' " (*Hasson*, *supra*, 32 Cal.3d at p. 404.)

Here, the evidence was relevant to prove that Ford knew it was designing and manufacturing a vehicle with the same stability design defects as the Bronco II. It was also evidence that could establish malice, fraud and oppression necessary for punitive damages. Ford knew that to increase a vehicle's stability, it needed to widen the vehicle's track width and lower the center of gravity. The Wilsons presented evidence that Ford engineers requested such changes in the Explorer's design, but those were rejected. The Explorer's center of gravity, track width and SI were substantially similar to the Bronco II.

The court did not abuse its discretion in admitting evidence concerning the Bronco II's stability problems, as the Explorer's stability characteristics were substantially

similar. The evidence was relevant both to prove the cause of the Explorer's stability defect and to show notice on Ford's part at the time it was designing the Explorer.

B. Exclusion of Ford's Comparative Rollover Statistics

Ford asserts that the court erred by excluding Ford's "real-world safety record and comparative data" relating to Explorer rollover rates. We reject this contention.

1. Background

Ford cites several evidentiary rulings regarding the Explorer's comparative rollover rates that it asserts were erroneous. First, the court ordered stricken from the trial court record testimony offered by Ford that the Explorer "had one of the best rollover rates compared to other SUV's in its class." The court also refused to allow Ford's automotive engineering expert Don Tandy to testify as to whether the Explorer had a higher rollover rate than other SUV's (sport utility vehicles). Ford asserts that the court erred in refusing to allow its statistical expert, William Wecker, Ph.D., to testify that the Explorer had a rollover rate comparable to other SUV's. The court also refused to allow Ford's stability expert Lee Carr to testify concerning accident statistics and rollover rates of other vehicles.

Ford also contends that the court "compounded its errors" by allowing several of the Wilsons' witnesses to testify concerning their involvement in other Explorer rollover cases.

2. Waiver

The Wilsons assert that Ford waived the right to assert error regarding the testimony of its expert Dr. Wecker concerning the Explorer's rollover rate compared to other vehicles. The Wilsons point out that they brought a motion in limine to exclude his opinion, but the court reserved ruling

on his testimony pending a foundational showing by Ford, and thereafter Ford did not attempt to lay a foundation for his testimony.

Ford responds that the court ruled Dr. Wecker's testimony inadmissible in an unreported sidebar conference and that counsel for the Wilsons acknowledged this ruling on the record when it argued against admission of other similar evidence that Ford could not "get in from the Wecker types." Ford also asserts that it objected on several occasions more generally that it should have been allowed to present evidence of the Explorer's safety record as compared to other vehicles.

We conclude that there was no waiver. First, a review of the trial transcript indicates that counsel for the Wilsons did acknowledge on the record that Dr. Wecker's testimony was previously excluded by the court. Moreover, " '[w]here an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue, an offer of proof is not a prerequisite to raising the question on appeal . . . .' [Citation.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) P 8:275.6, p. 8-154.)

3. Analysis

Ford asserts that expert testimony concerning the Explorer's comparative rollover rate was admissible to demonstrate that the Explorer "is a reasonably safe vehicle that is not unusually prone to roll over in comparison to other vehicles." However, such evidence was irrelevant and inadmissible.

A manufacturer cannot defend a product liability action with evidence it met its industry's customs or standards on safety. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal. App. 3d 757, 803 [174 Cal. Rptr. 348] (*Grimshaw*); *Foglio v.*

Western Auto Supply (1976) 56 Cal. App. 3d 470, 477 [128 Cal. Rptr. 545].) In fact, admission of such evidence is reversible error. (*Heap v. General Motors Corp.* (1977) 66 Cal. App. 3d 824, 831 [136 Cal. Rptr. 304].) This is because in strict liability actions, "the issue is not whether defendant exercised reasonable care." (*Foglio*, *supra*, 56 Cal. App. 3d at p. 477.) Rather, the issue is whether the product fails to perform as the ordinary consumer would expect. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 435 [143 Cal. Rptr. 225, 573 P.2d 443] (*Barker*).)

In *Grimshaw*, *supra*, 119 Cal. App. 3d 757, the defect at issue was the Ford Pinto's gas tank. Ford requested that the court instruct the jury that, in considering whether the gas tank was defective, it was to consider " 'the extent to which its (Pinto's) design and manufacture matched the average quality of other automobiles and the extent to which its design and manufacture deviated from the norm for automobiles designed and manufactured at the same point in time.' " (*Id.* at p. 803.) The Court of Appeal held that the trial court properly refused the instruction as improper evidence of industry custom or practice. (*Ibid.*)

Thus, the court properly excluded evidence whereby Ford sought to prove that the Explorer's rollover rate was comparable to other vehicles on the road. That was evidence that improperly sought to show that it met industry standards or custom for rollovers.

Ford asserts that the comparative rollover rate was relevant to the "risk/benefit" analysis that must be considered in determining if a product is defective, citing *Barker*, *supra*, 20 Cal.3d 413. However, as explained in *Grimshaw*, the *Barker* risk/benefit analysis does not allow admission of such evidence: "The *Barker* court's enumeration of factors which may be considered under the risk-benefit test not only fails to mention custom or usage in the industry, the court otherwise makes clear by implication that they are inappropriate

considerations." (*Grimshaw*, *supra*, 119 Cal. App. 3d at p. 803.)

Ford also contends that the comparative rollover evidence was relevant to prove it did not act with oppression, fraud or malice and therefore was admissible to rebut the Wilsons' claim for punitive damages. However, as will be discussed in more detail, post, the Court of Appeal in *Grimshaw*, *supra*, 119 Cal. App. 3d 757 held that compliance with industry standards or custom was irrelevant not only to the issue of defect, but also to punitive damages. (*Id.* at pp. 792, 803, 807-822.) Indeed, counsel for Ford acknowledged at trial that the Wilsons' punitive damages allegations did not change *Grimshaw's* prohibition on industry custom and practice evidence.

Even if the comparative rollover data were not inadmissible as a matter of law as improper industry and custom evidence, it would still be inadmissible as unreliable and misleading. Ford's statistics from which the comparable rollover rate testimony would flow were drawn from two databases, FARS (Fatality Analysis Reporting System), and a state database tracking state accident information. FARS only included fatal rollover accidents and did not compare the relative stability of vehicles; included all vehicle types, not just SUV's; and did not track the cause of rollovers or the resulting injuries. The state database encompassed accidents from only 10 states, did not include the two most populous states, California and Texas, and did not detail causes of the rollovers.

In Ford's offer of proof for its expert Carr, it admitted his testimony was going to compare the Explorer's rollover performance to a variety of dissimilar vehicles, including Greyhound buses and passenger cars. The court excluded only that portion of his testimony. Carr opined that the Explorer's design did not contribute to the rollover. Rather, according to Carr, the Explorer rolled because Mrs. Wilson

steered it onto the dirt shoulder, which, because of the loose soil and uneven terrain, would make any vehicle, not just the Explorer, susceptible to rolling over. Carr also testified that the Explorer complied with stability guidelines related to steering. Over the Wilsons' objection, Carr was allowed to show a video of the rollover response of a 1992 Chevrolet van to challenge the testing methodology used by the Wilsons' expert Dr. Renfroe. Over the Wilsons' objection he was also allowed to testify concerning the number of rollovers of various vehicles around the country. According to Carr, the vast majority of rollovers for all types of vehicles happened off the paved surface of the road.

Further, while the court excluded evidence of the Explorer's comparative safety, accident or injury rates, it did not exclude the Explorer's own "real world safety record." Indeed, Ford never proffered such evidence at trial.

The court did not abuse its discretion by excluding Ford's proffered evidence on comparative rollover rates.

The court also did not "compound its errors" by allowing several of the Wilsons' witnesses to testify as to their involvement in other Explorer rollover cases. Ford did not object to this testimony as improper. The only objection to this testimony overruled by the court was "asked and answered."

II. NONECONOMIC DAMAGES

Ford asserts that the noneconomic damages award, a remitted by the court, of approximately $65 million to Mrs. Wilson, and the $5 million award to Mr. Wilson, as remitted by the court, are excessive as a matter of law, are the result of passion and prejudice, are extreme when viewed against awards that have been upheld in comparable cases, and violate its due process rights. Amicus curiae AAM also asserts that the award violates due process principles. We conclude that the noneconomic damage award to

Mrs. Wilson is excessive, the result of passion or prejudice, and that the substantial evidence in this case supports an award of $18 million. We also conclude, however, that Mrs. Wilson's award did not violate due process principles. We conclude that the award to Mr. Wilson of $5 million in damages for loss of consortium is reasonable and we affirm that award.

A. Size of the Award

1. Standard of review

"The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. . . . The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507 [15 Cal. Rptr. 161, 364 P.2d 337] (*Seffert*).)

"The reviewing court does not act de novo, however. As we have observed, the trial court's determination of whether damages were excessive 'is entitled to great weight' because it is bound by the 'more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule . . . .' [Citation.] All presumptions favor the trial court's determination [citation], and we review the record in the light most favorable to the judgment [citation]." (*Fortman v. Hemco, Inc.* (1989) 211 Cal. App. 3d 241, 259 [259 Cal. Rptr. 311].)

Further, " 'where the trial court has required a remission as a condition to denying a new trial "a verdict is reviewed

on appeal as if it had been returned in the first instance by the jury in the reduced amount." [Citations.]' [Citation.]" (*West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal. App. 3d 831, 877 [220 Cal. Rptr. 437] (*West*).)

2. Analysis

In reviewing a noneconomic damage award "[t]here are no fixed or absolute standards by which an appellate court can measure in monetary terms the extent of the damages suffered by a plaintiff as a result of the wrongful act of the defendant. The duty of an appellate court is to uphold the jury and trial judge whenever possible. [Citation.] The amount to be awarded is 'a matter on which there legitimately may be a wide difference of opinion'[citation]. In considering the contention that the damages are excessive the appellate court must determine every conflict in the evidence in respondent's favor, and must give him the benefit of every inference reasonably to be drawn from the record [citation]. [¶] While the appellate court should consider the amounts awarded in prior cases for similar injuries, obviously, each case must be decided on its own facts and circumstances. Such examination demonstrates that such awards vary greatly. [Citations.] Injuries are seldom identical and the amount of pain and suffering involved in similar physical injuries varies widely. These factors must be considered." (*Seffert, supra*, 56 Cal.2d at p. 508.)

Further, "[t]he fact that an award may set a precedent by its size does not in and of itself render it suspect. The determination of the jury can only be assessed by examination of the particular circumstances involved." (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal. App. 3d 626, 654-655 [151 Cal. Rptr. 399].)

"An appellate court should not assume to substitute its appraisal, for that of a jury, of the amount of damages for physical pain and mental suffering sustained by a party in a case where trial by jury was had as a matter of right

[citation], but in a case where it appears that a verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment [citations] the appellate court may reverse the judgment and remand the case for a new trial either on all the issues or on the issue of damages alone [citations], or it may, in the interests of justice and with the consent of the party against whom the modification is made, modify the judgment as to the amount of damages, and affirm it as modified [citations]." (*Deevy v. Tassi* (1942) 21 Cal.2d 109, 120-121 [130 P.2d 389]; see also *Hunton v. California Portland etc. Co.* (1944) 64 Cal. App. 2d 876, 882-885 [149 P.2d 471] [trial court, on a motion for new trial, found compensatory damages award excessive and reduced a jury verdict of $40,000 to $18,000; on appeal the appellate court, finding the award still excessive, reduced the damages to $10,000].)

Ford characterizes the jury's award to the Wilsons of $118 million in noneconomic damages ($105 million to Mrs. Wilson + $13 million to Mr. Wilson) and the court-reduced award of approximately $70 million (approximately $65 million to Mrs. Wilson + $5 million to Mr. Wilson) as "irrational, punitive, and the clear product of passion and prejudice" and asserts that the evidence "does not come close to supporting this unprecedented award."[6] We conclude that although Mrs. Wilson's injuries were catastrophic, analyzing

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6 In making this assertion, Ford neglects to discuss the evidence in support of the Wilsons' damages at all, much less in the light most favorable to the judgment. This failure in itself would allow this court to disregard Ford's arguments concerning damages. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [19 Cal. Rptr. 3d 416].) Nevertheless, we elect to consider Ford's contention on the merits.

all appropriate factors, reviewing the trial court record, and using our collective experience, we must reduce the noneconomic damage award as excessive and the product of passion and prejudice. We also conclude that the loss of consortium award to Mr. Wilson is reasonable and affirm that award. Because Ford focuses its discussion almost exclusively on the award to Mrs. Wilson, our analysis likewise focuses on whether that award was excessive.[7]

a. Nature of Mrs. Wilson's injuries

A review of the evidence shows the substantial nature of the Wilsons' noneconomic injuries. Mrs. Wilson, a once vibrant and energetic wife and mother is now a paraplegic, who is in constant and debilitating pain, has lost all control over her bladder and bowel movements, and now requires constant care from her husband. She is disfigured and subject to ailments associated with her injuries that could worsen her injuries or shorten her life span. Mr. Wilson has lost his role as a husband and is now reduced to being a constant caregiver.

Noneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (*i.e.*, the fact of the injury itself), disfigurement, disability, impaired

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[7] We also note, as discussed, ante, that we do not review whether the jury's original award of $118 million to the Wilsons "shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert*, *supra*, 56 Cal.2d at pp. 506-507.) Rather, since the court remitted the award to $70 million as a condition of denying Ford's motion for new trial, we review the noneconomic damage award " ' "as if it had been returned in the first instance by the jury in the reduced amount." [Citations.]' [Citation.]" (*West*, *supra*, 174 Cal. App. 3d at p. 877.)

enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy. (Judicial Council of Cal. Civ. Jury Instns. (2003-2004), CACI No. 3905A.)

In this case, the noneconomic damages suffered by Mrs. Wilson were substantial, permanent, and support a significant award. However, the reduced award of approximately $65 million is, even given the severity of her injuries, disproportionate to those injuries so as to "raise a strong presumption that it is based on prejudice or passion." (*Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 807 [7 Cal. Rptr. 2d 82].)

b. Amount of award vs. projected life span

We also consider the amount of the damage award in connection with Mrs. Wilson's projected life span of 35 years.[8] The damage award, as reduced by the court, still amounts to approximately $1,868,399 per year over her projected life span, an extremely high amount. Ford on the other hand argues an award of $1 million is reasonable, which would work out to $28,571 per year, and only $78 per day. While we believe that the award as reduced by the trial court is still excessive, we also do not believe that Ford's suggested award fairly and justly compensates Mrs. Wilson.

c. Comparison with other awards

In support of its position that the noneconomic damage award is excessive as a matter of law, Ford attempts to compare the award to published California decisions that have upheld damage awards on similar facts. The Wilsons,

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[8] Mrs. Wilson's projected life span at the time of trial was 33 years. However, we use 35 years here because the award of noneconomic damages included an award for approximately two years of past general damages.

on the other hand, argue that it is not appropriate to compare the award here to other cases, that we must review it only by looking at the particular facts of this case. We conclude that while it is appropriate to look at awards in similar cases, ultimately we must determine the propriety of the award based upon the facts of this case.

In *Seffert*, *supra*, 56 Cal.2d at page 508, the California Supreme Court stated, "While the appellate court *should consider the amounts awarded in prior cases for similar injuries*, obviously, each case must be decided on its own facts and circumstances. Such examination demonstrates that such awards vary greatly. [Citations.] Injuries are seldom identical and the amount of pain and suffering involved in similar physical injuries varies widely." (Italics added.) More recently, the California Supreme Court made the following statements in a footnote: "Defendants have compiled a lengthy list of judgments awarding damages which have been reversed on appeal as excessive. Those cases do not, *in and of themselves*, mandate a reversal here. The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding. [Citations.] Thus, we adhere to the previously announced and historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice on the part of the jurors." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, fn. 12 [118 Cal. Rptr. 184, 529 P.2d 608] (Bertero), italics added.)

The Wilsons assert that Bertero stands for the proposition that Courts of Appeal should not compare the damages in other similar cases at all in reviewing a claim that an award is excessive. However, we do not read Bertero so broadly. Its criticism of comparing damage awards from other cases was limited to the statement that judgments awarding damages in other cases "do not, *in and of themselves*, mandate a reversal." (*Bertero*, *supra*, 13 Cal.3d at p. 65, fn. 12, italics added.) In the quoted footnote the *Bertero* court cited the earlier Seffert court as support for its conclusion. (*Bertero*, *supra*, at p. 65, fn. 12.) Therefore, we conclude that a verdict may not be held to be excessive as a matter of law simply because it exceeds the amount awarded in other cases. Courts of Appeal must make their decisions based on the evidence in the case being reviewed. However, evidence of other verdicts is still relevant as a point of reference, to provide context to the award by establishing a range of values for similar injuries.

Ford cites five reported California decisions where noneconomic damages for purportedly similar injuries ranged from $1 million to $8.4 million. (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287 [96 Cal. Rptr. 2d 605] [50-year-old plaintiff—award of $1 million]; *Niles v. City of San Rafael* (1974) 42 Cal. App. 3d 230 [116 Cal. Rptr. 733] [child suffered paralysis from head trauma—award of $1,604,371]; *Rosh v. Cave Imaging Systems, Inc.* (1994) *26 Cal.App.4th 1225* [32 Cal. Rptr. 2d 136] [the plaintiff rendered paraplegic from gunshot—award of $2.99 million]; *Fortman v. Hemco, Inc.* (1989) 211 Cal. App. 3d 241 [259 Cal. Rptr. 311] [three-year-old girl rendered paraplegic from fall from car—$6 million award]; *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516 [117 Cal. Rptr. 2d 220, 41 P.3d 46] [the plaintiff rendered paraplegic after his truck rolled—$8.4 million award].)

However, the cited cases are of only small assistance. Of the five California cases cited by Ford, in only two were the damages claimed to be excessive, and in both cases the damages awards were upheld. (*Niles v. City of San Rafael*, *supra*, 42 Cal.App.3d at p. 244; *Fortman v. Hemco, Inc.*, *supra*, 211 Cal. App. 3d at p. 261.) In the case with the largest noneconomic damage award, the size of the award was not challenged on appeal. (*Hess v. Ford Motor Co.*, *supra*, 27 Cal.4th at p. 520.) Ford cites no published California decisions involving same or similar injuries where a noneconomic damage award was reversed as excessive.

The Wilsons on the other hand cite an unpublished California decision that involved an award of $38 million in combined economic and noneconomic damages, reduced by 50 percent due to the plaintiff's comparative fault, to a quadriplegic who was 53 years old, and an award to his wife of $13 million for loss of consortium, which the Court of Appeal upheld. The Wilsons also cite a published decision by an appellate court in Indiana that upheld an award of $55 million in combined economic, noneconomic, and loss of consortium damages, already reduced by a finding that the plaintiff was 20 percent at fault, making the total award $66 million. (*Ritter v. Stanton* (Ind.Ct.App. 2001) 745 N.E.2d 828, 833, 857.)

A review of all of these cases shows a range between $1 million and $66 million in compensatory damages awards and substantial differences in the facts of each case. This demonstrates that while a comparison of other cases may give us a point of reference, ultimately our decision must be based upon the evidence in this case.

d. Evidence in record that jury acted out of passion or prejudice

Perhaps the most important factor that we must consider in determining if the award of noneconomic damages is excessive, other than the amount of the award, is whether

there is evidence in the record to support defendants' claim that the jury acted out of passion or prejudice. In this case we have substantial evidence in the record that demonstrates the jury's award was the product of such improper emotions and therefore must be reduced.

In discussing economic damages in closing argument, counsel for the Wilsons argued that Mrs. Wilson suffered "an economic loss of $4.6 million dollars . . ., based on the evidence that came before you." The jury awarded Mrs. Wilson what counsel asked for. The reasonableness of this amount for economic damages is not in dispute on appeal.

In discussing noneconomic damages in his closing argument, counsel for the Wilsons described some of the matters that could be included in such an award. This included past and future physical pain, mental suffering, and loss of enjoyment of life. Counsel then suggested a method for calculating these numbers, taking into account the past injury, as well as future injuries over her 33-year life expectancy. Following that discussion, counsel made the following statement: "I respectfully submit that if you look at the catastrophic injury that we have, the numbers there, they are probably three to four times the specials is what you are going to find. It's going to be fair, just and reasonable. And this is an awful lot of money. I know it is. It's a lot of money. But when someone says it's a lot of money, why are we doing this, you tell them it's a lot of pain. It's a loss of a human being's dignity and worth. . . . And I submit to you that there is no higher value than a good woman who is a good wife, a good mother, a good neighbor, that is out there helping others. And I can't put the number on it, but I want you to be reasonable, just and fair, recognizing the humanity of this issue." (Italics added.) Thus, counsel was requesting the jury award noneconomic damages to Mrs. Wilson in an

amount three to four times the amount they awarded in economic damages, or $13.8 to $18.4 million.

As to Mr. Wilson's loss of consortium claim, counsel argued that "it's probably going to be equated perhaps reasonably just to what the economic loss is for his noneconomic loss." Counsel was thus requesting that the jury award Mr. Wilson $4.6 million for his loss of consortium claim.

Next, addressing all the compensatory damages, the Wilsons' counsel stated the following: "I invite defense counsel to address my discussion of damages. If he does not discuss damages in his closing, if he does not disagree with me, you can accept these numbers as reasonable and just and fair." (Italics added.)

Defense counsel did not address the issue of damages in closing argument.

When we compare these numbers to the amount the jury awarded, it is apparent that the jury disregarded the Wilsons' counsel's own statements as to what was a reasonable amount to award in this case. On noneconomic damages to Mrs. Wilson, the jury awarded $105 million, or approximately 13 times the amount counsel requested and stated was "fair, just and reasonable." The reduced award of approximately $65 million is still approximately three to five times that amount. This provides compelling evidence that the jury rejected what even the Wilsons' counsel believed was fair and reasonable, and acted out of passion or prejudice.

The jury's award of loss of consortium damages also supports this conclusion. The jury awarded Mr. Wilson $13 million for his loss of consortium claim, or almost three times what the Wilsons' counsel requested.

The jury's complete rejection of the damages suggested by the Wilsons' counsel, a range for noneconomic damages

and an amount for loss of consortium that counsel characterized as fair, reasonable and just, is compelling evidence the jury acted out of passion or prejudice. The fact that the jury's award, and the award as remitted by the court, far exceeded, and had no relation to, the amounts requested by counsel suggests that the jury was not acting as a fair and neutral trier of fact.

There was also a question posed by Ford's counsel that, in light of Mrs. Wilson's catastrophic injuries, may well have inflamed the passions of the jury significantly enough to result in the excessive damage award. Ford's trial counsel, in its last question on cross-examination of Mr. Wilson, posited the following:

"[Q] The silver lining, to the extent that there could be one, it has brought you and [Mrs. Wilson] and the family closer together? [¶] . . .

"[A] I think where we were together before, we are together after. I don't think it's done more for us. I think it's—I don't think it's a benefit or a plus in any way. I am sorry, I don't think I can see it that way."

This question implied that the family should find a silver lining in what befell Mrs. Wilson. It may very well have been viewed as callous by the jury and might explain, in some manner, the actions of the jury in rendering a verdict so out of line with the amounts requested by the Wilsons' own counsel.

e. Our review of the record

In addition to considering the above factors, we have reviewed the record to determine whether the award, as remitted by the court, is excessive. This includes reviewing the nature and extent of Mrs. Wilson's injuries, the testimony of lay and expert witnesses on damages, and the damage award. Our own review of the record reveals that the

noneconomic damage award was excessive and was the product of passion or prejudice.

f. Conclusion

Based upon all of the above factors, and utilizing our collective experience, we conclude that the award of noneconomic damages to Mrs. Wilson, even as remitted by the court, was excessive and that the facts of this case instead support an award of $18 million, within the ratio/range requested by the Wilsons' counsel. As we have discussed, *ante*, the award, even as reduced by the trial court, far exceeds the amount suggested as reasonable, fair and just by the Wilsons' attorney to the jury. That is compelling evidence that the jury acted out of "passion and prejudice" in awarding noneconomic damages. Further, although each case must be analyzed on its own facts, the award far exceeds any award we could locate that was upheld by a California appellate court.

However, the reduction to $18 million in noneconomic damages is in the range of one recent unreported decision in California where the award of such damages was upheld on appeal. Moreover, utilizing our collective experience, we conclude that an award of $18 million in noneconomic damages is proportionate to Mrs. Wilson's substantial injuries, and is proportionate to the economic damages award. Considering the substantial nature of Mrs. Wilson's injuries, we conclude that $18 million is a just and reasonable amount, an amount " 'a reasonable person would estimate as fair compensation' " *under the circumstances of this case. (Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1665 [28 Cal. Rptr. 2d 88].)

Ford asserts briefly that the remitted award of $5 million for loss of consortium to Mr. Wilson was also excessive, citing cases with loss of consortium awards of $229,000 to $2.55 million. However, utilizing the same factors we considered above, and noting the devastating impact on

Mr. Wilson's life that Ford's conduct has caused, we do not find the remitted award for loss of consortium to be excessive or the product of passion or prejudice. The amount to which the court reduced these damages approximates the amount suggested by the Wilsons' counsel.

Moreover, to avoid further delay and expense to the parties, and because the record in this matter is sufficiently definite to determine the proper amount of noneconomic damages, we will remit the award of noneconomic damages to $18 million for Mrs. Wilson, conditioned on her acceptance of this reduced amount. If Mrs. Wilson does not agree to the reduced amount, the matter will be reversed and remanded for a new trial on the issue of noneconomic damages, as specified in California Rules of Court, rule 24(d).[9]

B. Due Process Considerations

Ford also asserts that the noneconomic damages award is "unconstitutionally excessive as a matter of federal due process." Amicus curiae AAM makes the same argument, asserting that due process considerations applicable to punitive damages awards should also apply to compensatory damages. This contention is unavailing.

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[9] Ford asserts that if the noneconomic damages award to Mrs. Wilson is determined to be the product of passion or prejudice, we are required, as a matter of law, to grant a new trial on all issues. However, case authority demonstrates it is appropriate to issue a remittitur under such circumstances. (*See Deevy v. Tassi*, *supra*, 21 Cal.2d at pp. 120-121; *Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 586-589 [81 P.2d 894]; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1255-1256 [1 Cal.Rptr.2d 301]; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1011-1012 [193 Cal.Rptr. 206].)

Ford and AAM ignore the fact that while the United States Supreme Court has in several recent decisions held that due process rights limit the amount of punitive damages that may be imposed upon an individual, a basic underpinning of those decisions was the very distinction between compensatory damages, which are designed to compensate the plaintiff, and punitive damages, which are in the nature of fines or sanctions, designed to punish and deter a defendant. For example, in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416 [155 L. Ed. 2d 585, 123 S. Ct. 1513] (*State Farm*), the majority opinion began its analysis by making just this distinction: "[I]n our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. [Citation.] Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' [Citations.] By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution." After establishing this important distinction, the high court concluded that the "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." (*State Farm*, *supra*, 538 U.S. at p. 416, italics added.) The court likened punitive damages to criminal penalties, imposed without the protections of a criminal trial: "Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." (*Id.* at p. 417.)

Ford and AAM cite no authority that constitutional due process limitations applicable to punitive damages awards, as recently confirmed by the United States Supreme Court (see *State Farm*, *supra*, 538 U.S. at p. 412), also apply to compensatory damages awards. Nevertheless, AAM asserts that the rule applicable to punitive damages awards should be

extended to noneconomic damage awards because (1) defendants need notice of their potential exposure to such liability that is imposed in a vague and standardless manner; and (2) the lack of concrete standards for such awards enables juries to pursue punitive goals in rendering such awards.

However, because noneconomic damages are not a punishment that serves to deter conduct, but rather compensation to make a plaintiff whole as a result of a defendant's conduct, uncertainty in the proof does not preclude their recovery: "[O]nce the cause and existence of damages have been . . . established [with reasonable certainty], recovery will not be denied because the damages are difficult of ascertainment. . . . The law only requires that the best evidence be adduced of which the nature of the case is capable, and the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision." (*Dallman Co. v. Southern Heater Co.* (1968) 262 Cal. App. 2d 582, 594 [68 Cal. Rptr. 873]; see also *Speegle v. Bd. of Fire Underwriters* (1946) 29 Cal.2d 34, 46 [172 P.2d 867] [" 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty [in fixing the amount of damages] which his wrong has created' "].)

As the United States Supreme Court has noted, " '[T]he common law rule as it existed at the time of the adoption of the Constitution' was that 'in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.' [Citation.]" (*Feltner v. Columbia Pictures Television, Inc.* (1998) 523 U.S. 340, 353 [140 L. Ed. 2d 438, 118 S. Ct. 1279]; see also *Barry v. Edmunds* (1886) 116 U.S. 550, 565 [29 L. Ed. 729, 6 S. Ct. 501] ["nothing is better settled than [the principle] that, in . . . actions for torts where

no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict"].) Thus, we are loath to usurp this core function of the jury by relying on mathematical formulas to assess the amount of damages that may be awarded, simply because noneconomic damages are not readily quantifiable.

Nor does the imagined danger that vague standards for imposing or reviewing noneconomic damage awards will lead to juries using such awards as punishment as opposed to compensation justify imposing due process limitations on such awards. The jury was instructed that they "must not let bias, sympathy, prejudice, or public opinion influence [their] decision." Although the jury was instructed that as to noneconomic damages "[n]o fixed standard exists for deciding the amount of these damages," they were also instructed that they "must use [their] judgment to decide a reasonable amount based on the evidence and [their] common sense." The jury was instructed that for future economic damages, "[Mrs.] Wilson must prove that she is reasonably certain to suffer that harm." The court, in instructing the jury on noneconomic damages, also delineated the type of harm for which Mrs. Wilson could recover: "Noneconomic damages may consist of the following: [¶] Past and future physical pain, past and future mental suffering, past and future enjoyment of life, past and future disfigurement, past and future physical impairment, past and future inconvenience, past and future grief, past and future anxiety, past and future humiliation, past and future emotional distress."

Thus, under these instructions juries are given guidance as to the proper matters they may consider in making an award of noneconomic damages. These guideposts protect against the purported danger that juries might use such an award to punish a defendant.

Moreover, to the extent that a jury's award of noneconomic damages is challenged as excessive, the judge, sitting as a 13th juror, then will review the evidence to determine if the award should be remitted. The trial judge is not limited to setting aside an excessive damage award where there is evidence the jury acted out of passion or prejudice. Rather, " 'it is within the sound discretion of the trial court in ruling on a motion for a new trial on the ground of excessive damages, to grant the same when there is a substantial conflict in the evidence regarding the extent of the damage.'" (*Hughes v. Hearst Publications, Inc.* (1947) 79 Cal. App. 2d 703, 705 [180 P.2d 419].) This gives the defendants a further check against excessive awards of noneconomic damages.

Finally, the standard under which appellate courts review such awards, that awards will be reversed if they are the product of "passion or prejudice," also serves to protect against such results. It is true that recent cases have stated that awards for emotional distress can in some instances have a punitive element. (*Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 223 [40 Cal. Rptr. 3d 92]; *State Farm*, *supra*, 538 U.S. at p. 426.) However, by reducing the award to Mrs. Wilson for noneconomic damages to $18 million, an amount proportionate to her injuries and economic loss, we have removed that portion of the award that was the product of "passion or prejudice," and no punitive element remains.

AAM relies heavily upon a law review article for its position that the vague standards for quantifying noneconomic damage awards justifies imposing federal due process constraints on such awards. However, the author of that article concluded that the solution to such unchecked awards is limits or standards imposed by legislatures, not application of due process notions to compensatory awards. (Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System* (2004) 90 Va. L.Rev. 1401, 1414, 1417-1418.)

Ford and AAM cite one out-of-state authority that states in a footnote that "[a] grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.' " (*Gilbert v. DaimlerChrysler Corp.* (2004) 470 Mich. 749 [685 N.W.2d 391, 400, fn. 22].) However, that court expressly declined to address this constitutional issue and therefore it is not authority for the proposition cited. (*Ibid.* ["there is no need to reach this constitutional question"].)

We conclude that it is not necessary to impose federal due process principles to limit noneconomic damage awards because (1) the Supreme Court in *State Farm*, *supra*, 538 U.S. 408 imposed due process limits on punitive damages awards because they are similar to criminal penalties, without the protections afforded the defendants in criminal proceedings, and noneconomic damages are designed to compensate, not punish, a defendant; (2) the defendants have adequate notice of potential awards; and (3) the review accorded damage awards by trial and appellate courts ensures that there is no punitive element in noneconomic damage awards.

III. PUNITIVE DAMAGES

Ford asserts that the punitive damages award must be reversed because (1) the Wilsons only proved that reasonable people could disagree regarding the design decisions made by Ford; (2) it complied with all applicable governmental standards; (3) it was improper to admit evidence of Ford's overall financial condition; and (4) the award is excessive under federal and California law. *Amicus curiae* PLAC argues in support of Ford's first contention, and amicus curiae the Chamber argues in support of the second. We conclude that the punitive damages award, as remitted, is excessive and reduce it to $55 million. We reject the remainder of Ford's and *amici curiae's* contentions.

A. The "Reasonable People Can Disagree" Argument

1. Standard of Review

We review an award of punitive damages to see if there is substantial evidence that supports a finding by clear and convincing evidence that a defendant acted with fraud, malice or oppression. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 606 [92 Cal. Rptr. 2d 897].)

2. Analysis

In this case the Wilsons presented evidence, which the jury accepted, that Ford knew of dangerous instability defects in the Explorer. Ford's own testing showed that it was unstable and prone to rollover on flat dry pavement at less than highway speeds. Ford knew before the Explorer was released for sale that the same instability characteristics led to serious injuries to Bronco II drivers. The Wilsons presented evidence that Ford knew that the Explorer's roof was weak and that roof crush caused injury during rollover accidents. Ford had the technology to make the Explorer stable and strengthen the roof, but did not use it. The modifications to strengthen the roof would have cost approximately $20 per vehicle. This evidence constitutes substantial evidence to support the jury's decision to award punitive damages.

Ford asserts, however, that because there was a "reasonable disagreement" among experts concerning the propriety of its design decisions it cannot, as a matter of law, be subject to punitive damages. We reject this contention.

The Wilsons presented expert testimony concerning the design and safety issues on the Explorer. Ford presented contrary expert testimony. The jury rejected the testimony of Ford's experts, as it was entitled to do, that its design decisions were proper and reasonable. Ford's assertion that punitive damages are not allowed unless all experts agree there were improper design decisions is unavailing. If such an assertion were true, punitive damages would never be

allowed in cases where the defendant simply had an expert that disagreed with the plaintiff's expert.

Moreover, the California cases cited by Ford to support this contention do not support its position. They were cases where there was simply a failure of proof to support a punitive damages award (*See Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 996-997 [4 Cal. Rptr. 2d 837, 824 P.2d 643]; *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 348 & 350, fn. 10 [108 Cal. Rptr. 2d 776]; *Mason v. Mercury Cas. Co.* (1976) 64 Cal. App. 3d 471, 474-475 [134 Cal. Rptr. 545]; *Stewart v. Truck Ins. Exchange* (1993) *17* Cal.App.4th 468, 483-484 [21 Cal. Rptr. 2d 338]; *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184-185 [28 Cal. Rptr. 2d 371].)

Ford also asserts that there was no evidence that any of Ford's decision makers believed the Explorer's design presented an unreasonable risk of injury, presenting the jury with only the "bare and illogical 'inference' that unnamed Ford officials 'must have' acted with malice . . . ." However, the Wilsons presented direct and substantial evidence of Ford management's recognition of the safety implications of their design decisions. As discussed in detail in the factual background, *ante*, there is substantial evidence that Ford decision makers knew how to make the Explorer less dangerous, but chose not to because of financial considerations. Ford's "reasonable people can disagree" argument is unavailing.

PLAC supports Ford's arguments regarding disagreements among experts as a defense to punitive damages, asserting that where there are contemporaneous disagreements among experts regarding design decisions, punitive damages should be barred. However, PLAC cites no California authority for such a proposition. The California case law PLAC cites involves the well-established rule in

insurance bad faith cases that an insurer cannot be liable for bad faith if there is an objectively reasonable dispute about coverage. (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co., supra*, 90 Cal.App. 4th at pp. 347-348; *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1293 [97 Cal. Rptr. 2d 386].) However, these cases state a substantive standard of liability for insurance claims and do not address when it is proper to impose punitive damages. Notably, PLAC has cited no California product liability case that holds that expert disputes concerning design provide a defense to punitive damage liability or, for that matter, liability in its entirety.

In a footnote, PLAC also cites several out-of-state cases for the proposition that a contemporaneous disagreement among experts bars liability for punitive damages. However, several of the cases cited by PLAC simply do not state such a proposition. Rather, some stand for the proposition that expert disagreement is merely one factor that could be considered in assessing the propriety of punitive damages awards. (*Loitz v. Remington Arms Co, Inc.* (1990) 138 Ill. 2d 404 [563 N.E.2d 397, 406-407, 150 Ill. Dec. 510]; *Owens-Corning Fiberglas Corp. v. Garrett* (1996) 343 Md. 500 [682 A.2d 1143, 1158-1168]; *Satcher v. Honda Motor Co.* (5th Cir. 1995) 52 F.3d 1311, 1316-1317.)

PLAC does cite two cases from Iowa that held a reasonable disagreement among experts about the adequacy of design was a defense in those cases to punitive damages. (*Mercer v. Pittway Corp.* (Iowa 2000) 616 N.W.2d 602, 618; *Hillrichs v. Avco Corp.* (Iowa 1994) 514 N.W.2d 94, 100.) However, no case from any other state has cited these cases with approval, and we could not locate any other state that follows this "rule." Because these cases apply Iowa law, we are not bound by their holdings and decline to adopt such a rule in California.

PLAC also argues that punitive damages should be barred where there was a contemporaneous expert opinion that a product design that caused a plaintiff injury was necessary to avoid greater injuries of other kinds. This contention is unavailing.

First, this argument by PLAC focuses only on Ford's decisions regarding the Explorer's stability. There is no assertion that Ford allowed the roof defect to exist because changing the design would create a greater risk of other injuries. Because the roof's crashworthiness provided an independent basis for the award of punitive damages, this argument fails.

Further, PLAC cites to no evidence in the record to suggest that any member of Ford rejected changes to the Explorer's stability design because to do so would create a greater risk of injury in another manner. Rather, it only cites to statements made in Ford's brief that imply such a rationale, but Ford's statements are not supported by the cited record.

Ford and PLAC's "reasonable people can disagree" argument is unavailing.

B. Compliance with Government Standards

Ford and amicus curiae the Chamber assert that Ford is not subject to punitive damages as a matter of law because it complied with all applicable governmental regulatory standards. In particular, Ford asserts that it complied with FMVSS (Federal Motor Vehicle Safety Standard) 216, which sets the standard for how crush resistant an automobile roof must be. Ford also asserts that it complied with a National Highway Traffic Safety Administration (NHTSA) regulation requiring all SUV's to display a warning concerning the risk of rollovers. (*See* 49 Fed.Reg. 20016 (May 11, 1984).) However, Ford and the Chamber's contentions are unavailing for several reasons.

The law in California is that punitive damages are permitted in product liability actions precisely because "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. [Citations.] Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles." (*Grimshaw*, *supra*, 119 Cal. App. 3d at p. 810.) Compliance with a law or safety regulation in itself does not establish that a product is not defective or that a defendant who sells or rents the product for use by the public has exercised due care. (*See Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126-127 [184 Cal. Rptr. 891, 649 P.2d 224]; *Amos v. Alpha Property Management* (1999) 73 Cal.App.4th 895, 901 [87 Cal. Rptr. 2d 34].)

The Chamber asks us to reject the rule stated above in *Grimshaw*, *supra*, 119 Cal. App. 3d 757, that compliance with industry standards does not bar punitive damages, because that decision predates amendments to Civil Code section 3294 that modified the definitions of "oppression, fraud [and] malice" and required proof by clear and convincing evidence. But *Grimshaw* did not base its conclusions on the standard of proof for punitive damages claims or the precise definitions of the terms "oppression, fraud and malice." The Chamber points to nothing in the 1987 amendments, or to any legislative history for those amendments, suggesting the Legislature intended to disapprove *Grimshaw*.

The Chamber relies on the extensive federal regulation of the automobile industry through the NHTSA and the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act) (49 U.S.C. § 30101 et seq.), which, in conjunction with NHTSA-promulgated standards, has declared the minimum safety standards for automobiles.

However, a review of the Safety Act and its legislative history demonstrates that the federal government did not intend to preclude punitive damages where an auto manufacturer has met minimum safety standards.

Title 49 United States Code section 30103(e) (section 30103(e)) of the Safety Act contains a savings clause that provides: "Compliance with a motor vehicle safety standard prescribed under this chapter *does not exempt a person from liability at common law*." (Italics added.)

Thus, section 30103(e) expressly provides that compliance with federal safety standards is *not* a defense to state common law products liability. Punitive damages have long been a part of the common law, originating in the 1763 English case *Huckle v. Money* (1763) 95 Eng.Rep. 768, and finding early acceptance in the United States when the United States Supreme Court upheld its constitutionality in *Day v. Woodworth* (1851) 54 U.S. 363, 370 [14 L. Ed. 181]. Thus, in enacting this savings clause, Congress was aware that part of the common law to which it referred in section 30103(e) included liability for punitive damages and could have excluded such damages from its terms.

The Chamber asserts that Congress, in enacting the savings clause in section 30103(e), only sought to preserve common law liability in general and did not intend to address punitive damages. However, a review of the legislative history of the Safety Act further demonstrates that Congress intended through the savings clause to leave untouched all aspects of common law products liability actions, including awards of punitive damages.

The House Report for the Safety Act states that section 30103(e) "is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense *or otherwise to affect the rights of parties under common law particularly those related to warranty, contract, and tort liability*." (H.R.Rep. No. 1776-89, 2d Sess., p. 24

(1966), italics added.) The Safety Act's Senate sponsor stated on the Senate floor that "[c]ompliance with Federal standards would not necessarily shield any person from broad liability at the common law. *The common law on product liability still remains as it was.*" (Remarks of Sen. Magnuson, 89 Cong. Rec. 14230 (daily ed. June 24, 1966), italics added.) Its House sponsor, while arguing in floor debate against the need for criminal penalties in the Safety Act stated, "[W]e have preserved *every single common law remedy that exists against a manufacturer* for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer and they can be exercised against the manufacturer." (Remarks of Rep. Staggers, 89 Cong. Rec. 19663 (daily ed. Aug. 17, 1966), italics added.)

The fact that California does not follow this proposed rule that compliance with federal minimum safety standards bars claims for punitive damages is also demonstrated by the fact that such a rule has been proposed through legislation in California on several occasions but has not been enacted. In 2000 the Legislature considered a bill that would have enacted the rule that Ford proposes. (Assem. Bill No. 2582 (1999-2000 Reg. Sess.) § 1.) However, the bill never made it out of committee. (Assem. Bill No. 2582, from committee without further action, 2 Assem. Final Hist. (1999-2000 Reg. Sess.) p. 1865.) A similar bill did not secure passage in 1996. (Assem. Bill No. 2880, from committee without further action, 2 Assem. Final Hist. (1995-1996 Reg. Sess.) p. 1711.) Another such bill was introduced in February 2006 in the Senate. (Sen. Bill No. 1429 (2005-2006 Reg. Sess.) § 2.) There would be no need for such legislation if compliance with government standards already provided a defense to punitive damages claims.

Ford and the Chamber's argument is also unavailing because there are no federal standards for stability of

vehicles, one ground upon which Ford's liability for punitive damages is based. Ford points to a NHTSA regulation requiring all SUV's to display a warning concerning the risk of rollovers. (*See* 49 Fed.Reg. 20016 (May 11, 1984).) However, having a warning sticker is not the same as meeting a safety standard, and, in any event, it would not bar a state law claim alleging stability defects.

The Chamber asserts that NHTSA's failure to promulgate stability standards and to require only a warning sticker represents a "policy choice" based upon difficulties in predicting rollover risk and that compliance with the warning requirement alone should bar punitive damages. However, this exact argument was rejected by the Eleventh Circuit in *Watkins v. Ford Motor Co.* (11th Cir. 1999) 190 F.3d 1213, 1216-1218, a Bronco II rollover case. (*See also Ford Motor Co. v. Ammerman* (Ind.Ct.App. 1999) 705 N.E.2d 539, 555-556.)

Ford's asserted compliance with federal safety regulations did not bar the punitive damages award.

C. Fair Notice of Exposure to Punitive Damages

Ford contends that if punitive damages can be awarded on this record, Civil Code section 3294 is unconstitutionally vague because it failed to give Ford fair notice that its conduct could subject it to punitive damages. This contention is unavailing.

Ford made just this argument 25 years ago in *Grimshaw*, *supra*, 119 Cal. App. 3d 757. The Court of Appeal rejected it, concluding that "punitive damages are recoverable in a nondeliberate or unintentional tort where the defendant's conduct constitutes a conscious disregard of the probability of injury to others." (*Id.* at p. 811.)

Additionally, Ford bases this contention on the fact that at most, reasonable people could disagree with the decisions

it made. However, we have already discussed and rejected this argument, *ante*.

D. Consideration of Ford's Overall Financial Condition

Ford asserts that the punitive damages award must be reversed because the jury was allowed to consider its overall financial worth (almost $13 billion) as opposed to its worth tied to sales of products in California. We reject this contention.

Where the defendant's oppression, fraud or malice has been proven by clear and convincing evidence, California law permits the recovery of punitive damages "for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) As our Supreme Court recently held, in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1185 [29 Cal. Rptr. 3d 379, 113 P.3d 63] (Simon): "[T]he defendant's financial condition is an essential factor in fixing an amount that is sufficient to serve these goals without exceeding the necessary level of punishment. '[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.' [Citation.] '[P]unitive damage awards should not be a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.' [Citation.]" (*See also State Farm, supra*, 538 U.S. at p. 428 [use of wealth as a factor not " 'unlawful or inappropriate' "].)

Despite this authority, however, Ford cites *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253 [11 Cal. Rptr. 3d 317] (*R.J. Reynolds*) for the proposition that in assessing punitive damages courts may only take into consideration the defendant's financial figures in the state where the wrong occurred.

In *R.J. Reynolds*, the State of California filed a complaint against the defendant tobacco company for an enforcement order of a consent decree entered into as part of a settlement agreement that prohibited targeting youth in advertising of tobacco products. The superior court found the defendant in violation of that agreement and entered summary judgment, permanently enjoining the company from continuing to violate the settlement. The court also awarded the state sanctions in the amount of $20 million. The defendant appealed, and this court reversed the award of sanctions, finding them to be excessive. Relying on recent United States Supreme Court precedent holding that it was improper to impose punitive damages against a defendant for conduct in one state based upon the defendant's out-of-state conduct, we held that the superior court in *R.J. Reynolds* erred when it based its sanctions award on the defendant's nationwide spending on advertising, as opposed to its advertising activities in California. (*R.J. Reynolds*, *supra*, 116 Cal.App.4th at pp. 1289-1290.) This court found the sanctions award to be error because "the People's request for $20 million in sanctions was based on Reynolds's nationwide spending on print advertising and profitability without evidence of its advertising spending or profitability in California." (*Id.* at p. 1290.) As the court stated in *R.J. Reynolds*, "the award of sanctions for Reynolds's conduct in California could not properly be based on Reynolds's nationwide financial figures without violating Reynolds's due process rights." (*Id.* at p. 1289.)

Based upon the above quoted language, Ford asserts that it was error to allow evidence of its overall financial condition, as opposed to its financial worth in California. This contention is unavailing.

Here, the trial court properly instructed the jury, at Ford's request, that it could not consider Ford's out-of-state conduct in imposing punitive damages: "In determining the amount

of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, you may consider only Ford's wrongful conduct, if any, that has had an adverse impact on the citizens of California. Accordingly, you may not award any punitive damages for the purpose of punishing Ford for the sale of vehicles in other states for any injuries that may have occurred in other states, or for the purpose of changing Ford's conduct in other states."

Consideration of Ford's overall financial condition was not allowed to punish it for out-of-state conduct as in *R.J. Reynolds*, but for the broader concept of ensuring that the amount of punitive damages was sufficient to act as a deterrent. Use of a defendant's financial condition in such a manner is proper because " 'the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.' " (*Simon, supra*, 35 Cal.4th at p. 1185.) Consideration of only a defendant's finances as they relate to the state in which they are sued would allow it to make them " 'a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.' [Citation.]" (*Ibid.*)

E. Amount of Award

Last, Ford argues that the amount of the punitive damages awarded to the Wilsons is excessive under the federal Due Process Clause of the 14th Amendment to the United States Constitution. We conclude that, after reducing the noneconomic damages award to Mrs. Wilson to $18 million, the award of punitive damages is excessive and will be reduced to $55 million, an approximate two-to-one ratio to the total compensatory damages award ($4.6 million in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium damages = $27.6 million x 2 = $55.2 million).

1. Standard of review

"In deciding whether an award of punitive damages is constitutionally excessive . . . we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct. [Citations.] This '[e]xacting appellate review' is intended to ensure punitive damages are the product of the ' " 'application of law, rather than a decisionmaker's caprice.' " ' [Citation.] [¶] On the other hand, findings of historical fact made in the trial court are still entitled to the ordinary measure of appellate deference." (*Simon*, *supra*, 35 Cal.4th at p. 1172, fn. omitted.)

"To state a particular level beyond which punitive damages in a given case would be grossly excessive, and hence unconstitutionally arbitrary, ' "is not an enviable task. . . . In the last analysis, an appellate panel, convinced it must reduce an award of punitive damages, must rely on its combined experience and judgment." ' [Citation.]" (*Simon*, *supra*, 35 Cal.4th at p. 1188.) Moreover, our "constitutional mission is only to find a level higher than which an award may not go; it is not to find the 'right' level in the court's own view." (*Ibid.*)

2. Analysis

The United States Supreme Court has determined that the federal Due Process Clause places limits on state courts' awards of punitive damages, limits appellate courts are required to enforce in their review of jury awards. (*State Farm*, *supra*, 538 U.S. at pp. 416-418.) The imposition of "grossly excessive or arbitrary" (*id.* at p. 416) awards is constitutionally prohibited, for due process entitles a tortfeasor to " 'fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.' " (*Id.* at p. 417.)

The United States Supreme Court and the California Supreme Court have stated that there are three factors to consider in determining whether the amount of a punitive damages award comports with the federal Due Process Clause: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the . . . harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages [and comparable civil penalties where available]." (*State Farm*, *supra*, 538 U.S. at p. 418; see *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191 [29 Cal. Rptr. 3d 401, 113 P.3d 82].) We discuss these factors in order.

Reprehensibility of conduct

Courts utilize five factors to help determine the degree of reprehensibility of a defendant's conduct: (1) whether the harm was physical and not merely economic; (2) whether the conduct demonstrated an indifference or reckless disregard for the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct was repeated or an isolated incident; and (5) whether the conduct was the result of intentional acts or mere accident. (*State Farm*, *supra*, 538 U.S. at p. 419; *Simon*, *supra*, 35 Cal.4th at p. 1180.) Further, the reprehensibility of a defendant's conduct is the most important indicator of the reasonableness of a punitive damages award. (*State Farm*, *supra*, 538 U.S. at p. 419; *Simon*, *supra*, 35 Cal.4th at p. 1180.)

Based upon our de novo review of the record, we conclude that the reprehensibility of Ford's conduct was high, given the catastrophic nature of Mrs. Wilson's injuries, Ford's reckless disregard for the safety of others, the repeated nature of Ford's conduct, and the fact that Ford's acts were intentional.

Focusing on the first factor, Ford's decision to release the defective Explorer resulted in catastrophic and permanent

physical injuries to Mrs. Wilson, not merely economic loss. She is permanently paralyzed and in constant, debilitating, pain. She is confined to a wheelchair, without sensation or muscular control of her lower body. She must rely on others to care for her. As Mrs. Wilson explained it: "Me being dependent on other people . . . for me that is very difficult because I have always been an independent sort of person. . . . I have always been the one that has done things for other people. For me that is very hard to . . . have to be in that kind of position. . . . I am in a wheelchair, I am not going to ever be out of a wheelchair, that whole concept is very . . . difficult to . . . accept. . . . The things that I really love to do I can't do anymore. The list is just—goes on and on."

As discussed *ante*, and as found by the jury, Ford's decision to release the defective Explorer without warning consumers of the risk of injury it posed evinced a reckless disregard for the safety of its customers. As the trial court noted in ruling on Ford's motion for new trial on the ground the punitive damage award was excessive, "the evidence showed Ford had a pattern of deficient design regarding safety in favor of increased financial returns and was the result of the conscious disregard of Ford executives." Our own independent review of the record compels the same conclusion. Thus, the second factor also supports a significant punitive damages award.

The target of the conduct in this case was consumers, individuals who were vulnerable as they would not understand vehicle design, development and manufacture, and would rely on Ford to inform them of risks as they made purchasing decisions.

Conduct is more reprehensible where, as here, it is part of repeated corporate policy or practice rather than an isolated incident. (*Johnson v. Ford Motor Co.*, *supra*, 35 Cal.4th at p. 1196.) In this case the conduct was repeated and not an

isolated incident. Ford had a pattern of deficient safety design that was ignored in favor of increased financial returns. As discussed in more detail, *ante*, that corporate policy or practice was evidenced by Ford's refusal to follow its engineers' recommendations to improve the stability of the Explorer. As the trial court noted, "[T]hat evidence was primarily adduced through Ford's own internal memoranda and correspondence."

The evidence presented by the Wilsons in this case supports a finding that Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management, knowing the unreasonable risk of harm posed to consumers, as opposed to a mere accident.

Moreover, the fifth factor, whether the conduct was the result of intentional acts or mere accident, "is of little value in assessing a California punitive damages award, as accidentally harmful conduct cannot provide the basis for punitive damages under our law. At a minimum, California law requires conduct done with 'willful and conscious disregard of the rights or safety of others' or despicable conduct done 'in conscious disregard' of a person's rights." (*Simon*, *supra*, 35 Cal.4th at p. 1181.) The jury's finding that Ford acted with "oppression, fraud or malice" demonstrates Ford's actions were intentional. In sum, the reprehensibility of Ford's conduct supports a significant award of punitive damages.

3. Ratio of punitive to compensatory damages

In *State Farm*, the United States Supreme Court, while still "declin[ing] . . . to impose a bright-line ratio which a punitive damages award cannot exceed," held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*State Farm*, *supra*, 538 U.S. at p. 425.) The high court "also explained that past decisions and statutory penalties approving ratios of three or four to one were

'instructive' as to the due process norm, and that while relatively high ratios could be justified when ' "a particularly egregious act has resulted in only a small amount of economic damages" [citation] . . . [t]he converse is also true. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.' " (*Simon*, *supra*, 35 Cal.4th at p. 1182.)

Our high court has interpreted this language from *State Farm* to mean that it established a "type of presumption: ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause." (*Simon*, *supra*, 35 Cal.4th at p. 1182, fn. omitted.)

Here, after our reduction of the noneconomic damages awarded to Mrs. Wilson, the compensatory damages, while substantial, are within a reasonable range for the type of catastrophic, permanent and ongoing injuries suffered by Mrs. Wilson, and the loss of her society, comfort and companionship to Mr. Wilson. Mrs. Wilson's recovery for noneconomic damages is proportionate to the injuries she suffered. Similarly, Mr. Wilson's recovery on his loss of consortium claim is proportionate to his substantial injury. Moreover, as discussed, *ante*, there was a high degree of reprehensibility to Ford's conduct. Because the noneconomic damages award is substantial, a low single digit ratio is appropriate. We are mindful of the Supreme Court's statement in *State Farm*, *supra*, 538 U.S. at page 425 that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." In

this case we conclude that a two-to-one ratio is warranted because the degree of Ford's reprehensibility is also high.

4. Comparable civil penalties

Ford does not address this factor in its opening brief. However, for the first time in its reply brief Ford asserts that there are comparable civil penalties to compare with the amount of the punitive damages claim. Ford cites title 49 United States Code section 30165(a) which it claims provides penalties for designing and selling defective vehicles, penalties that are $1,000 for each vehicle, up to a maximum of $800,000. Ford asserts that since the punitive damages award "dwarfs" the maximum penalties allowed under that federal statute, the punitive damage award is constitutionally infirm. This contention is unavailing.

First, we do not consider matters raised by appellants for the first time in their reply briefs. Because Ford did not address this factor in its opening brief, thus denying the Wilsons an opportunity to respond, it has waived the right to assert this issue on appeal. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761 [27 Cal. Rptr. 3d 648, 110 P.3d 903]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 [93 Cal. Rptr. 2d 364].)

Additionally, title 49 United States Code section 30165(a) is part of that portion of the Safety Act which provides, as discussed, *ante*, only minimum safety standards. Moreover, as also discussed in detail, *ante*, there is a savings clause that allows common law liability notwithstanding compliance with those standards, putting Ford on notice that it may be subject to private state actions that result in substantially higher damage awards than the civil penalties. The savings clause also evidences congressional intent that the maximum penalty allowed under title 49 United States Code section 30165 is not a sufficient penalty for all such violations because the varying degrees of plaintiffs' injuries

and defendants' culpability dictate a greater flexibility in punishment. (See *Ford Motor Co. v. Sperau* (Ala. 1997) 708 So. 2d 111, 122.)

Finally, the sanctions amounts in title 49 United States Code section 30165(a) were increased in 2000 to a range of $5,000 to $15 million, indicating Congress's belief that the original amounts were insufficient to deter vehicle manufacturers from placing defective automobiles on the road. The maximum penalty under the 2000 amendments is not "dwarfed" by the punitive damage award, as remitted.

5. Conclusion

Based upon the foregoing factors, and using our combined experience and judgment, we conclude that a two-to-one ratio of punitive damages to compensatory damages is sufficient to punish Ford and deter it from similar conduct in the future. This ratio is proportionate to the degree of harm suffered and the substantial award of compensatory damages. An award exceeding a two-to-one ratio would exceed the constitutional maximum that could be awarded under the facts of this case. (*Simon*, *supra*, 35 Cal.4th at p. 1188 [An appellate court's "constitutional mission is only to find a level higher than which an award may not go; it is not to find the 'right' level in the court's own view"].) Accordingly, we remit the punitive damage award to $55 million, approximately two times the total compensatory damage award to the Wilsons. If the Wilsons do not agree to the reduced amount, the matter will be reversed and remanded for a new trial on the issue of punitive damages, as specified in California Rules of Court, rule 24(d).

DISPOSITION

The judgment is affirmed in all respects except as to the award of noneconomic damages to Mrs. Wilson and punitive damages to the Wilsons. The award of noneconomic damages to Mrs. Wilson and punitive damages to the

Wilsons is reversed and remanded for retrial on the issue of the amount of noneconomic and punitive damages, unless the Wilsons shall, within 30 days from the date this opinion is filed, file with the clerk of this court and serve upon Ford the Wilsons' written consent to a reduction of Mrs. Wilson's noneconomic damages award to $18 million and the Wilsons' punitive damage award to $55 million, in which event the judgment will be modified to award the Wilsons noneconomic and punitive damages in that amount, and which will result in a total reduced award of $82,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium + $55 million in punitive damages), and in which event the judgment will be affirmed in its entirety, as modified. (Cal. Rules of Court, rule 24(d).) The parties shall bear their own costs on appeal.

McConnell, P. J., and Irion, J., concurred.

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

BENETTA BUELL-WILSON et al.,
Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY et al.,
Defendants and Appellants.

No. D045154, D045579
(Super. Ct. No. GIC800836)

Court of Appeal, Fourth District, California

August 17, 2006

ORDER MODIFYING OPINION AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on July 19, 2006, be modified as follows:

1. At the end of the second paragraph on page 9, after the sentence ending "disregarding contrary evidence submitted by Ford," add the following citation:

(*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

2. At the end of the second paragraph on page 11, after the sentence ending "whether the Explorer actually passed the computer tests," add the following sentence:

> The Explorer did pass the Consumers Union short course test, but that test was designed to measure its handling, not stability.

3. After the first paragraph on page 26, that terminates with the sentence that ends "off the paved surface of the road," add a new paragraph that reads:

> Further, while the court excluded evidence of the Explorer's comparative safety, accident or injury rates, it did not exclude the Explorer's own "real world safety record," Indeed, Ford never proffered such evidence at trial.

4. In the second full paragraph on page 34, the citation "(See *Raimondi v. Ford Motor Co.* (May 31, 2001, A091865) [nonpub. opn.].)[9]" is deleted. Included in that deletion is footnote 9 in its entirety.

5. In the first full paragraph on page 39, the citation "(See *Raimondi v. Ford Motor Co., supra*, A091865 [nonpub. opn.].)" is deleted.

4. At the end of the first paragraph on page 40, after the sentence ending "as specified in California Rules of Court, rule 24(d)," add as new footnote 9 the following footnote:

> Ford asserts that if the noneconomic damages award to Mrs. Wilson is determined to be the product of passion or prejudice, we are required, as a matter of law, to grant a new trial on all issues. However, case authority demonstrates it is appropriate to issue a remittitur under such circumstances. (See *Deevy v. Tassi, supra*, 21 Ca1.2d at pp.120-121; *Bellman v. San Francisco High School*

Dist. (1938) 11 Cal.2d 576,586-589; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220,1255-1256; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1011-1012.)

There is no change in the judgment.

The petition for rehearing is denied.

McCONNELL, P.J.

Copies to: All parties

APPENDIX C

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: August 19, 2004

DEPT. 63

PRESENT HON. Kevin A. Enright
JUDGE

CLERK:

Mary Ann Ybanez

GIC800836

BUELL-WILSON,
Plaintiffs

v.

FORD MOTOR COMPANY,
Defendants

MINUTE ORDER ON SUBMITTED MATTER: DEFENDANTS[’] MOTIONS FOR JNOV AND NEW TRIAL

Having taken Defendants Ford Motor Company and Drew Ford’s Motion for JNOV under submission, the Court rules as follows:

Defendants Ford Motor Company and Drew Ford’s Motion for JNOV is denied.

Plaintiffs’ claims are not barred by the California Supreme Court holding in *Ramirez v. Plough* (1993) 6 Ca1.4th 539. Defendants contend *Ramirez* requires the Court

to defer to and adopt the standards enacted by expert administrative agencies. In *Ramirez*, the issue was whether the manufacturer of over-the-counter medication could be liable for distributing its products with English-only labels when it was foreseeable non-English readers would be buying the products. In that instance, the Supreme Court held the standard for the duty of care was the administrative duty of care which only required warning labels in English. However, the Supreme Court also recognized that generally, statutory compliance is not a defense to tort liability. (*Id.* at 547-548.)

However, the current case is more consistent with *Buccery v. General Motors Corp.* (1976) 60 Cal.App.3d 533, cited with approval in Ramirez. In *Buccery*, the plaintiff was involved in a motor vehicle accident where the impact caused the rear of plaintiff's head to strike the rear window of his pick-up truck. Plaintiff sued the manufacturer for design defect for its failure to install head restraints. The Court of Appeal held compliance with federal safety standards does not preclude imposition of common law liability for a defective product and that federal regulations are supplementary to the common law of products liability. (*Id.* at 540-541.) The Buccery case is more analogous to the facts of this case and thus, Plaintiffs' claims are not barred.

Neither are Plaintiffs' claims preempted by federal law. 49 USCA §30103(b) addresses the issue of preemption and states:

> Preemption (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a state may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the

> United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

That same statute also includes a savings clause which states:

> Common law liability.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law. (49 USC §30103(e).)

In this case, with regard to the issue of stability, there is no applicable federal standard in place which would preempt Plaintiffs' state tort claims. Ford cites to the National Highway Traffic Safety Administration's ("Safety Administration") rejection of the use of the Stability Index, however, the non-existence of the safety standard cannot preclude state tort claims under these statutes.

Ford argues that since the Safety Administration has failed to adopt the use of the Stability Index as a standard, Plaintiffs are precluded from using the Stability Index to show a defect. Ford relies on *Geier v. American Honda Motor Company* (2000) 529 U.S. 861, where the plaintiff sued the vehicle manufacturer for failure to equip the vehicle with airbags. The Supreme Court held the action was preempted since it actually conflicted with the Department of Transportation standard requiring manufacturers to place driver's side airbags in some, but not all 1987 automobiles. Unlike *Geier*, since the Safety Administration did not adopt a stability standard, there is no federal standard with which to conflict, and Plaintiffs' claims are not preempted.

With regard to the roof strength, Ford asserts the Explorer meets the requirements of Federal Motor Vehicle Safety Standard ("FMVSS") 216. However, the FMVSS is a minimum standard and does not preclude a finding of a product defect. The savings clau e in 49 U.S.C. § 30103 is meant to leave room for state law claims, especially in cases such as this where the federal safety standard is a minimum safety standard. (*Geier* at 868.)

Substantial evidence supports the jury's verdict that Defendant Drew Ford failed to warn the Wilsons of the Explorer's dangerous propensities. Mrs. Wilson testified she asked the salesmen whether the Explorer would rollover and also that she would not have bought the vehicle if she had been told there was a danger of rollover. Further the Wilsons testified no one at Drew Ford warned them regarding proper inflation of the tires. In fact, the Drew Ford employees testified they did not know the proper tire pressure. Therefore, there is substantial evidence to support the judgment on the failure to warn issue.

Substantial evidence also supports the jury's verdict that Defendant Ford failed to warn of the crashworthiness of the roof related structure. Plaintiffs' expert Mr. Forrest testified weaker A-pillars and B-pillars were used in the Explorer which resulted in the Explorer having a propensity to collapse in a rollover collision. The evidence showed Ford was aware of such. Ford was not found liable on the issue of failure to warn with regard to stability. (Special Verdict No. 7.)

With regard to the compensatory damages, Plaintiffs presented substantial evidence to support the Wilsons' non-economic damage claims, including the difficulties of their daily life and the past, current and future physical pain Mrs. Wilson endures.

Ford argues judgment should be granted in favor of Ford on the issue of punitive damages because at most, Plaintiffs

showed reasonable people disagree on the design of the Explorer. However, Plaintiff presented clear and convincing evidence Ford acted with malice and that Ford acted with a conscious disregard for the safety of others. Even if there was a disagreement between reasonable experts, it does not negate the clear and convincing evidence that Ford acted with malice. Therefore, the motion for JNOV of the issue of punitive damages on this basis is denied.

In addition, Ford argues punitive damages should not be awarded because Civil Code §3294 violates Ford's due process rights. The Ford Explorer met all of the national safety requirements and thus, Ford had no notice of what acts would subject it to punitive damages. First, applying or redrafting Civil Code §3294 as suggested by Ford would require articulating all conduct that is despicable and obviate the plain meaning of the statute. Furthermore, Ford continues to focus on the product and not the process by which the Explorer was developed. Ford cannot protect itself by arguing the vehicle meets all applicable safety standards when there is evidence Ford knew of potentially fatal defects during the development and manufacture of the vehicle not addressed by the safety standards and chose not to remedy those problems. Such acts constitute despicable conduct and expose Ford to the prospect of punitive damages.

It is obvious the punitive damages awarded were twice the amount of compensatory damages awarded. The US Supreme Court held that single-digit multipliers of the compensatory damages comport with due process while still achieving a state's goal of deterrence and retribution. (*State Farm v. Campbell* (2002) 538 U.S. 408, 425.) The Supreme Court stated State Farm's out-of-state conduct could not justify a 145-1 compensatory to punitive damage award and State Farm should only be punished for its conduct directed at the plaintiffs. (*Id.* at 426-427.)

Ford argues that the case of *People v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253 holds that nationwide financial figures cannot serve as a basis for punitive damages in California. However, the *R.J. Reynolds* case involved substantially different circumstances. The State of California and R.J. Reynolds had settled a case regarding the tobacco company's advertising to minors. In that case, the State of California was requesting punitive damages for R.J. Reynolds' violation of a Master Settlement Agreement in the amount of $20 million, which represented 10 percent of Reynolds' nationwide advertising spending. No compensatory damages were awarded, therefore the measure of punitive damages could not be calculated based on a single-digit multiplier. In that case, it is clear the only basis for punitive damages was the in-state financial figures of R.J. Reynolds. In this case, however, the punitive damages were within the single-digit multiplier limit set forth in State Farm, and the punitive damage verdict is not unconstitutional.

Furthermore, the focus on just the injuries incurred by the plaintiffs does not serve as an evidentiary limitation on financial information. (*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, fn. 7.) "Evidence of defendant's financial condition is not unlawful or inappropriate under *State Farm*." (*Id.*) Thus, Plaintiffs' presentation of the net worth of Ford was not improper.

In addition, the Court has ordered a remittitur in the context of Ford's motion for a new trial.

Plaintiffs' evidentiary objections to the declaration of William Thomson are overruled.

Defendants' request for judicial notice of Exhibits 2-4, 8, 10-24 and 40-42 is granted and the remaining requests are denied.

Defendants' request for judicial notice of Exhibit 3 to the Supplemental Notice of Lodgment is granted.

Defendant's request for judicial notice of Exhibit 4 to the Supplemental Notice of Lodgment is denied. (Ford's Reply, footnote 6.)

Defendants' evidentiary objections to the declaration of James Iagmin are overruled.

Defendants' evidentiary objections to the declaration of Allan Kam are sustained.

MOTION FOR NEW TRIAL

Having taken Defendants Ford Motor Company and Drew Ford's Motion for a New Trial under submission, the Court rules as follows:

Defendants Ford Motor Company and Drew Ford's Motion for a New Trial is granted on the issue of damages only on the ground of excessive damages subject to the condition the motion for a new trial is denied if the Plaintiffs consent to a reduction of damages.

The Court finds that the damages awarded are excessive. Therefore, a remittitur is appropriate. The Court does not find that the jury rendered its verdict due to passion or prejudice. Pursuant to Code of Civil Procedure section 662.5(b), the Court grants a new trial on the issue of damages only on the ground of excessive damages subject to the condition that the motion for a new trial is denied if the plaintiffs consent to a reduction of those damages. In exercising its independent judgment as to what are fair and reasonable damages based upon the evidence and law, the Court finds that the compensatory damages awarded to plaintiff Benetta Buell-Wilson should be reduced to $70,000,000, the compensatory award to plaintiff Barry Wilson should be reduced to $5,000,000, and the punitive damage award to both should be reduced to $75,000,000, making the total award $150,000,000.

This order is based on the following reasons:

The evidence, in the Court's opinion, is insufficient to support a compensatory damage verdict in favor of Ms. Buell-Wilson in the amount of $109,606,004. In reaching that finding and the other findings on the verdict on damages, the Court has weighed the evidence, including reasonable inferences therefrom, and is convinced from the entire record the jury clearly should have reached a different verdict on damages. That same evidence, however, recited below, is sufficient to support a compensatory damage award in favor of Ms. Buell-Wilson in the amount of $70,000,000.

In determining what is fair and reasonable, there is no question that reasonable minds can differ. In exercising its independent judgment, the Court has considered all the evidence presented by both sides.

The jury obviously found that both plaintiffs were excellent witnesses on their own behalf. The Court agrees. Both were forthright and sincere. Neither exaggerated either the injuries Mrs. Buell-Wilson sustained in the accident or the circumstances resulting therefrom.

Ms. Buell-Wilson's back was broken in the accident. Paraplegia at the level of T12 has resulted in no function or sensation in her lower body. That is permanent.

The jury found that Ms. Buell-Wilson's past economic loss amounted to $573,348 and her future economic loss amounted to $4,032,656. Those figures are not in dispute in this motion.

With regard to her non-economic damages, the plaintiff testified that before the accident she was an avid outdoors person and led an active and rewarding life. She has a black belt in karate. She frequently hiked and camped with her family.

Following the accident, Ms. Buell-Wilson remained hospitalized for approximately two months. Her doctors testified that she suffers constant aching in her back where

surgically implanted rods remain. She experiences stabbing and shooting pain over her right side. Her pain will increase over the rest of her life.

She suffers from a neurogenic bladder and bowel. While hospitalized, she suffered four urinary tract infections. Those have been recurring and could potentially be fatal. Due to her lack of sensation and control in her genital area and buttocks, her ability to recognize infection is lessened. Such infections will require hospitalization in the future. Because Ms. Buell-Wilson has no control of her bowel and bladder, she must manually extract fecal matter and catheterize herself several times each day.

Ms. Buell- Wilson's shoulder joints are rapidly degenerating and cause and will continue to cause her a significant amount of pain due to the frequent transfers to and from her wheelchair each day. She is unable to reach her second-story bedroom and must sleep in the laundry room in the garage of her home. Ms. Buell-Wilson can no longer perform the active volunteer work in which she engaged before the accident. All of this evidence was mostly uncontroverted.

As for the compensatory award to Mr. Wilson, the evidence is insufficient to support a compensatory damage verdict in favor of Mr. Wilson in the amount of $13,000,000 for loss of consortium. That same evidence, however, is sufficient to support a compensatory damage award in his favor in the amount of $5,000,000.

Mr. Wilson is his wife's caretaker. To help prevent pressure sores, Mr. Wilson rolls his wife over in bed on occasion each night. He assists her with wheelchair transfers and catheterizations. The intimate life he and his wife shared has been lost. They no longer hike and camp together.

While the Court finds the verdict of the compensatory damages in favor of Ms. Buell-Wilson and Mr. Wilson to be

..cessive, the Court finds that the compensatory awards to both, as reduced, are fair and reasonable in the exercise of its independent judgment. Those determinations are based upon the reasons mentioned above, which highlight the evidence on damages presented at trial.

The Court finds the punitive damages verdict to be excessive as well and reduces the punitive damages award to $75,000,000. The reasons are as follows:

The evidence is insufficient to support a punitive damages verdict in the favor of the Wilsons in the amount of $246,000,000. That same evidence, however, is sufficient to support a punitive damages award in the amount of $75,000,000.

In evaluating the punitive damages, the courts must consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408,418. In analyzing those three guideposts, the Court concludes the punitive damages award must be reduced.

Substantial evidence supports the finding of malice on the part of Ford and a high degree of reprehensibility. The degree of reprehensibility is determined by considering whether:

> [T]he harm caused was physical as opposed to economic; the tortious conduct" evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result

> of intentional malice, trickery, or deceit, or mere accident. (*Id.* at 419.)

In considering these factors, the evidence showed Ford had a pattern of deficient design regarding safety in favor of increased financial returns and was a result of the conscious disregard of Ford executives. That evidence was primarily adduced through Ford's own internal memoranda and correspondence. This conduct was reprehensible and weighs in favor of punitive damages.

The remittitur reduces the punitive damage award to a one-to-one ratio relative to the compensatory award. This is well within the second guidepost set forth by the Supreme Court. Even as reduced, the compensatory damage award is large. When compensatory awards are substantial, a ratio of equal to the compensatory damages is within the limits of the due process guarantee. (*Id.* at 425.) The punitive damages are fair and reasonable and proportionate to the amount of harm suffered by the Plaintiffs.

With regard to the third guidepost, the harm suffered by Ms. Buell-Wilson could have resulted in criminal penalties although that fact alone does not warrant the imposition of punitive damages. (*Id.* at 428.) The statutory penalties for a non-compliant and defective vehicle do not fully address potential physical or fatal injury to victims. After consideration of the criminal and civil penalties, the Court concludes neither a higher or lower ratio between the compensatory and punitive damage awards, as reduced, are required.

With regard to the evidentiary issues as a basis for a new trial, the motion for new trial is denied.

The safety records of other vehicles were properly excluded. A product is defective if the product fails to perform as safely as an ordinary consumer would expect when used in the intended manner or where there is risk of

danger inherent in the design which outweighs the benefits of that design. (*Barker v. Lull Engineering Co., Inc.* (1978) 20 Cal.3d 413.) Ford advocates that evidence of the safety of other SUVs is necessary to show the safety of the Ford Explorer. However, under the *Barker* analysis, the only issue is the safety of the Explorer. "In a strict products liability case, industry custom or usage is irrelevant to the issue of defect." (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 803.) The issue is whether the product is defective, not whether it is better than the other products on the market.

Ford argues the Bronco II evidence should have been excluded. Evidence of a predecessor model's defect is admissible only if the other version and current version are substantially similar. The Plaintiffs are not required to prove the Bronco II was exactly the same as the 1997 Ford Explorer driven by Mrs. Wilson, only that they are substantially similar. (*Hasson v. Ford Motor Co.* (1982) 32 Ca1.3d 388, 404.) In the instance where the evidence is offered to show the defendant had notice, a lesser showing of similarity is necessary. (*Id.*; *Laird v. T. W. Mather Inc.* (1958) 51 Ca1.2d 210, 220.) The determination of whether the previous model is substantially similar is left to the trial judge. (*Jensen v. Southern Pacific Co.* (1954) 129 Ca1.App.2d 67, 74.) In this case, Plaintiffs presented substantial evidence of the design carry-over from the Bronco II to the Explorer, evidence of the intermingling of the development and testing of the Bronco II and the Explorer and the similar source of rollover problems between the Bronco II and Explorer for the Court to find the two vehicles are substantially similar.

If Plaintiffs accept the remittitur, Plaintiffs shall submit an amended judgment to the Court.

Plaintiffs' objections to the declaration of Ann Cochran are overruled.

Plaintiffs' objections to the declaration of Richard Serafini are overruled.

Plaintiffs' objections to the declarations of George L. Priest and W. Kip Viscusi are sustained.

Defendants' objections to the declarations of Dennis Schoville and Louis Amell are overruled.

IT IS SO ORDERED.

Dated: August 19, 2004 KEVIN A. ENRIGHT

KEVIN A. ENRIGHT
Judge of the Superior Court

APPENDIX D

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

BENETTA BUELL-WILSON;
BARRY S. WILSON,
Plaintiffs,

v.

FORD MOTOR COMPANY,
a Delaware Corporation;
DREW FORD, a California Corporation,
Defendants.

Case No. GIC800836

June 25, 2004

JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial on March 15, 2004, in Department 63 of the San Diego Superior Court, the Honorable Kevin A. Enright, Judge presiding; plaintiffs Benetta Buell-Wilson and Barry S. Wilson appearing by Dennis A. Schoville and Louis G. Arnell of Schoville & Arnell, LLP, and defendants Ford Motor Company and Drew Ford appearing by Ronald E. Cabaniss, Rand Wallis and Todd Croftchik of Cabaniss Smith Tocle & Wiggins and Anthony Sonnett of Yukevich & Sonnett.

A jury of twelve persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the

jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to-wit:

We answer the questions submitted to us as follows:

1. Did the 1997 Ford Explorer have a defect in its design as to its stability?

x Yes ___No

If your answer to Question No. 1 is "Yes", then answer Question Nos. 2 and 3. If your answer to Question No. 1 is "No", then answer Question No. 4.

2. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

x Yes ___No

Answer Question No. 3.

3. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Answer Question No. 4.

4. Was there a defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer?

x Yes ___No

If your answer to Question No. 4 is "Yes", then answer Question Nos. 5 and 6. If your answer to Question No. 4 is "No", then answer Question No. 7.

5. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

x Yes ___No

Answer Question No. 6.

6. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Answer Question No. 7.

7. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

___Yes x No

If your answer to Question No. 7 is "Yes", then answer Question Nos. 8 and 9. If your answer to Question No. 7 is "No", then answer Question No. 10.

8. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

___Yes ___No

Answer Question No. 9.

9. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

___Yes ___No

Answer Question No. 10.

10. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

x Yes ___No

If your answer to Question No. 10 is "Yes", then answer Question Nos. 11 and 12. If your answer to Question No. 10 is "No", then answer Question No. 13.

11. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

x Yes ___No

Answer Question No. 12.

12. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Answer Question No. 13.

13. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

x Yes ___No

If your answer to Question No. 13 is "Yes", then answer Question Nos. 14 and 15. If your answer to Question No. 13 is "No", then answer Question No. 16.

14. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

_x_ Yes ___ No

Answer Question No. 15.

15. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

_x_ Yes ___ No

Answer Question No. 16.

16. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

_x_ Yes ___ No

If your answer to Question No. 16 is "Yes", then answer Question Nos. 17 and 18. If your answer to Question 16 is "No", then follow the instructions after Question No. 18 below.

17. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

_x_ Yes ___ No

Answer Question No. 18.

18. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Follow the instructions below:

If your answer to any of Question Nos. 2, 5, 8, 11, 14 or 17 is "Yes", then answer Question No. 19. If your answer to any of Question Nos. 3, 6, 9 12, 15 or 18 is "Yes", then answer Question No. 20. Otherwise, stop here, answer no further questions, and have the presiding juror sign and date this form.

19. What are Benetta Wilson's damages?

a. Past economic loss, including lost earnings, lost earning capacity and past medical expenses: $ 573,348

b. Future economic loss, including lost earnings, lost earning capacity and medical expenses: $ 4,032,656

c. Past non-economic loss, including (but not limited to) physical and mental pain and suffering; and loss of enjoyment of life: $ 6,000,000

d. Future non-economic loss, including (but not limited to) physical and mental pain and

suffering; and loss of enjoyment of life: $ 99,000,000

20. What are Barry Wilson's damages?

a. Past loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations: $ 3,000,000

b. Future loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations: $ 10,000,000

Answer Question No. 21.

21. Did Ford Motor Company act with oppression or fraud or malice?

x Yes ___ No

Signed: Lisa M. Corrie
Presiding Juror

Dated: 6-1-04

After the above verdict on special issues was returned, the same jury of twelve persons was impaneled for the purpose of deciding punitive damages. One witness was sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issue submitted to the jury and the answer given thereto by the jury, which said verdict was in words and figures as follows, to wit:

We, the jury in the above-entitled action, find as follows:

1. What amount of punitive damages, if any, do you award to plaintiffs, Benetta Buell-Wilson and Barry S. Wilson, against Defendant Ford Motor Company?

$ 246,000,000

Dated: June 3, 2004 Lisa M. Corrie
FOREPERSON

It appearing by reason of special verdict that plaintiff Benetta Buell-Wilson is entitled to judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $109,606,004; and Barry Wilson is entitled to judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $13,000,000; and it further appearing by reason of special verdict that plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, are entitled to judgment against defendant Ford Motor Company for punitive damages in the amount of $246,000,000.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That plaintiff Benetta Buell-Wilson have judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $109,606,004.

That plaintiff Barry Wilson have judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $13,000,000.

That plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, have judgment against defendant Ford Motor Company for punitive damages in the amount of $246,000,000.

Plaintiffs shall recover costs in the amount of $ -.

Dated: JUN 25 2004/s/ KEVIN A. ENRIGHT
Hon. Kevin A. Enright

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

BENETTA BUELL-WILSON, et al.,
Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY,
Defendant and Appellant.

Case No. GIC800836 September 3, 2004

AMENDED JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial on March 15, 2004, in Department 63 of the San Diego Superior Court, the Honorable Kevin A. Enright, Judge presiding; plaintiffs Benetta Buell-Wilson and Barry S. Wilson appearing by Dennis A. Schoville and Louis G. Arnell of Schoville & Arnell, LLP, and defendants Ford Motor Company and Drew Ford appearing by Ronald E. Cabaniss, Rand Wallis and Todd Croftchik of Cabaniss Smith Toole & Wiggins and Anthony Sonnett of Yukevich & Sonnett.

A jury of twelve persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its

verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to-wit:

We answer the questions submitted to us as follows:

1. Did the 1997 Ford Explorer have a defect in its design as to its stability?

_x_ Yes ___ No

If your answer to Question No. 1 is "Yes", then answer Question Nos. 2 and 3. If your answer to Question No. 1 is "No", then answer Question No. 4.

2. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

_x_ Yes ___ No

Answer Question No. 3.

3. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

_x_ Yes ___ No

Answer Question No. 4.

4. Was there a defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer?

_x_ Yes ___ No

If your answer to Question No. 4 is "Yes", then answer Question Nos. 5 and 6. If your answer to Question No. 4 is "No", then answer Question No. 7.

5. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

__x__Yes ____No

Answer Question No. 6.

6. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

__x__Yes ____No

Answer Question No. 7.

7. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

____Yes __x__No

If your answer to Question No. 7 is "Yes", then answer Question Nos. 8 and 9. If 'our answer to Question No. 7 is "No", then answer Question No. 10.

8. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

____Yes ____No

Answer Question No. 9.

9. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

___Yes ___No

Answer Question No. 10.

10. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

_x_Yes ___No

If your answer to Question No. 10 is "Yes", then answer Question Nos. 11 and 12. If your answer to Question No. 10 is "No", then answer Question No. 13.

11. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

_x_Yes ___No

Answer Question No. 12.

12. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related

structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

__x__Yes ___No

Answer Question No. 13.

13. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

__x__Yes ___No

If your answer to Question No. 13 is "Yes", then answer Question Nos. 14 and 15. If your answer to Question No. 13 is 'No", then answer Question No. 16.

14. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the 997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

__x__Yes ___No

Answer Question No. 15.

15. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

__x__Yes ___No

Answer Question No. 16.

16. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the

crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

_x_ Yes ___ No

If your answer to Question No. 16 is "Yes", then answer Question Nos. 17 and 18. If your answer to Question 16 is "No", then follow the instructions after Question No. 18 below.

17. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

_x_ Yes ___ No

Answer Question No. 18.

18. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

_x_ Yes ___ No

Follow the instructions below:

If your answer to any of Question Nos. 2, 5, 8, 11,14 or 17 is "Yes", then answer Question No. 19. If your answer to any of Question Nos. 3, 6, 9 12, 15 or 18 is "Yes", then answer Question No. 20. Otherwise, stop here, answer no further questions, and have the presiding juror sign and date this form.

19. What are Benetta Wilson's damages?

a. Past economic loss, including lost earnings, lost earning capacity and past medical expenses:

$573,348

b. Future economic loss, including lost earnings, lost earning capacity and medical expenses:

$4,032,656

c. Past non-economic loss, including (but not limited to) physical and mental pain and suffering; and loss of enjoyment of life:

$6,000,000

d. Future non-economic loss, including (but not limited to) physical and mental pain and suffering; and loss of enjoyment of life:

$99,000,000

20. What are Barry Wilson's damages?

a. Past loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations:

$3,000,000

b. Future loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations:

$10,000,000

Answer Question No. 21.

21. Did Ford Motor Company act with oppression or fraud or malice?

x Yes ___No

Signed: Lisa M. Corrie
Presiding Juror

Dated: 6-1-04

After the above verdict on special issues was returned, the same jury of twelve persons was impaneled for the purpose of deciding punitive damages. One witness was sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issue submitted to the jury and the answer given thereto by the jury, which said verdict was in words and figures as follows, to wit:

We, the jury in the above-entitled action, find as follows:

1. What amount of punitive damages, if any, do you award to plaintiffs, Benetta Buell-Wilson and Barry S. Wilson, against Defendant Ford Motor Company?
$246,000,000

Dated: June 3, 2004 Lisa M. Corrie
FOREPERSON

By reason of said special verdict, on June 25, 2004, plaintiff Benetta Buell-Wilson had judgment entered against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $109,606,004; plaintiff Barry Wilson had judgment entered against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $13,000,000; and plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, had judgment entered against defendant Ford Motor Company for punitive damages in the amount of $246,000,000.

Following entry of judgment, defendants Ford Motor Company and Drew Ford filed Motions for JNOV and for New Trial. After briefing by all parties, and oral argument, on August 19, 2004, the Court issued its written Minute Order. Pursuant to he Minute Order, defendants Ford Motor Company and Drew Ford's Motion for JNOV vas denied; defendants Ford Motor Company and Drew Ford's Motion for a New Trial was granted on the issue of damages only on the ground of excessive damages subject o the condition the Motion for a New Trial would be denied if the plaintiffs consented to reduction of damages, as follows:

> Plaintiff Benetta Buell-Wilson's compensatory damages reduced from $109,606,004 to $70,000,000;
>
> Plaintiff Barry Wilson's compensatory damages reduced from $13,000,000 to $5,000,000;
>
> Punitive damages reduced from $246,000,000 to $75,000,000.

Plaintiffs Benetta Buell-Wilson and Barry Wilson, having accepted the Court's remittitur,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That plaintiff Benetta Buell-Wilson have judgment against Ford Motor Company and Drew Ford, jointly and severally, in the amount of $70,000,000.

That plaintiff Barry Wilson have judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $5,000,000.

That plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, have judgment against defendant Ford Motor Company for punitive damages in the amount of $75,000,000.

Plaintiffs shall recover costs in the amount of $_____.

Dated: September 3, 2004

_____
Hon. Kevin A. Enright

APPENDIX F

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Attorneys for Defendants
FORD MOTOR COMPANY and DREW FORD

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

BENETTA BUELL-WILSON; BARRY S. WILSON,
Plaintiffs,

vs.

FORD MOTOR COMPANY, a Delaware Corporation;
DREW FORD, a California Corporation; and
DOES 1-50, inclusive,
Defendants

CASE NO. GIC800836

CRTM: Department 63
JUDGE: Hon. Kevin A. Enright

FORD MOTOR COMPANY AND DREW FORD'S PROPOSED SPECIAL JURY INSTRUCTIONS

DATE OF FILING: November 26, 2002
TRIAL DATE: November 14, 2003

Defendants Ford Motor Company and Drew Ford, Inc. submit the following proposed Special Jury Instructions:

* * * * *

SPECIAL JURY INSTRUCTION NO. 15
(Punitive Damages)

You may award punitive damages only if you find by clear and convincing evidence that the design of the Ford Explorer was so obviously and extremely defective that Ford had no arguably legitimate reasons for choosing that design and that it acted in a despicable manner. You may not award punitive damages if reasonable people could disagree about whether Ford's conduct was correct or lawful.*

* See BAJI 14.71, 14.72.1; Cal. Civ. Code § 3294; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 4 490 (1915) ($6,300 civil penalty violated due process where defendant was "well justified in regarding its conduct] as reasonable and in acting on that belief" and even assuming that defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable"); *Kwan v. Mercedes-Benz of North*

America, Inc., 23 Cal. App. 4th 174, *Id* at 184-85 (1994) ("Neither punishment nor deterrent is ordinarily called for if the defendant's actions proceeded from an honest mistake or sincere and reasonable difference of factual evaluation. As our Supreme Court recently observed, 'courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions.") (quoting *Lusardi Construction Co. v. Aubry* (1992) 1 Cal. 4th 976, 996-997) (internal quotations omitted); *see also Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal. App. 4th 335, 348, 350 and n.10 (when there is a "genuine dispute" over legal or factual issues, the evidence will not support punitive damages); *Silberg v. California Life Ins. Co.* (1974) 11 Cal. 3d 452, 462 (when the evidence showed an insurer was not put on notice by prior cases that its interpretation of policy was incorrect, the evidence did not support a award of punitive damages); *Opsal United Services Auto. Assn.* (1991) 2 Cal. App. 4th 1197, 1205 (reversing bad faith verdict of over $1,700,000 in compensatory and punitive damages against homeowner's insurer, which declined to pay property damage claim based on "genuine" policy dispute); *Mason v. Mercury Cas. Co.* (1976) 64 Cal. App. 3d 471, 474-75 (insurer's reasonable interpretation of contract, even if wrong, could not support malice finding); *Kendall Yacht Corp. v. United California Bank* (1975) 50 Cal. App. 3d 949, 958-59 (rejecting claim for punitive damages because it "remains purely speculative as to whether the Bank acted with such malice rather than out of a bona fide disagreement over how far the Bank was required to go helping the Kendalls with their financial problems"); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating award in defective design case where "there is a genuine dispute in the scientific community as to" the reasonableness of the design).

* * * * *

SPECIAL JURY INSTRUCTION NO. 18
(Punitive Damages)

Punitive damages generally are not appropriate where a manufacturer has designed its product to meet or exceed government safety standards.*

* See *Ramirez v. Plough*, 6 Cal. 4th 539, 552-52 (1993) (declining to impose tort liability for "matters that are peculiarly susceptible to legislative and administrative investigation and determination, based upon empirical data and consideration of the viewpoint of all interested bodies"); *id.* at 555 (rejecting plaintiff's attempt to impose a duty to warn on drug manufacturers "that is broader in scope and more onerous than that imposed by applicable statutes and regulations"); *Macias v. State of California*, 10 Cal. 4th 844 (1995) (same). See also *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (fact that no governmental agency has ever required anything other than the allegedly defective feature is grounds for reversing jury award of punitive damages); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (holding evidence insufficient to support award of punitive damages in light of compliance with federal safety standards); *Drabik v. Stanley-Bostich, Inc.*, 997 F.2d 496, 510 (8th Cir, 1993); *Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1155 (11th Cir. 1993) (compliance with industry practice and custom is relevant to the punitive damage determination); *Cooper v. General Motors Corp.*, 702 So.2d 428, 434 (Miss. 1997) ("As a general rule, a state cannot impose common law damages on individuals for doing what a federal act or regulation authorized them to do."); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (Compliance "is not the type of behavior which supports an award of punitive damages; indeed, punitive damages, the purpose of which is to 'punish, penalize or deter,' are, as a general rule, improper where a defendant has adhered to environmental and safety regulations."); *Chrysler Corp. v. Wolmer,*

499 So: 2d 823;826 (Fla. 1986) (evidence insufficient to support award of punitive damages in light of compliance with federal safety standards); *American-Law Institute, Reporter's Study: Enterprise Responsibility for Personal Injury*, Vol. II, at (1991) ("At a minimum,. such regulatory compliance should preclude the award of punitive damages."); *Prosser and Keeton on Torts*, § 36 at n.41 ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages."); David C. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 42 (1982) ("proof of compliance with the regulation or statute ordinarily should be deemed to be conclusive proof of good faith and hence a conclusive defense to a punitive damages claim."). *Cf. American Suzuki Motor Corp. v. Superior Court,* 37 Cal. App. 4th 1291, 1299-1300 (1995) ("The remedy which will best promote consumer safety, and which will address the real parties' concern that 'tragic consequences' will result if the defect is not remedied, is to petition the National Highway Traffic Safety Administration (NHTSA) for a defect investigation.").

* * * * *

SPECIAL JURY INSTRUCTION NO. 19
(Punitive Damages)

Punitive damages ordinarily cannot be awarded where the manufacturer has designed its product consistent with industry custom and practice.*

* See *Mason v. Mercury Cas. Co.*, 64 Cal. App. 3d 471; 475 (1977) (upholding grant of directed verdict for defendant on punitive damages where evidence showed that defendant's interpretation of disputed insurance contract provision conformed to standard practice within industry); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (vacating punitive damage award where defendant's design was consistent with that of other manufacturers); *Drabik v. Stanley-Bostich, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) "[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind"); *Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1155 (11th Cir. 1993) (compliance with industry practice and custom is relevant to the punitive damage determination); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (punitive damages inappropriate where defendant's conduct was consistent with industry practice); *Cooper v. General Motors Corp.*, 702 So.2d 428, 434 (Miss. 1997) ("As a general rule, a state cannot impose common law damages on individuals for doing what a federal act or regulation authorized them to do."); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (Compliance "is not the type of behavior which supports an award of punitive damages; indeed, punitive damages, the purpose of which is to 'punish, penalize or deter,' are, as a general rule, improper where a defendant has adhered to environmental and safety regulations."); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 826 (Fla. 1986) (holding evidence insufficient to support award of punitive damages in light of compliance with federal safety standards); *American Law Institute, Reporter's Study:*

Enterprise Responsibility for Personal Injury, Vol. II at 101 (1991) ("At a minimum, such regulatory compliance should preclude the award of punitive damages."); *Prosser and Keeton on Torts*, § 36 at n.41 ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages."); David C. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 42 (1982) ("proof of compliance with the regulation or statute ordinarily should be deemed to be conclusive proof of good faith and hence a conclusive defense to a punitive damages claim.").

* * * * *

SPECIAL JURY INSTRUCTION NO. 27
(Punitive Damages)

In determining the appropriate amount of punitive damages, if any, in this case, you may consider only the harm to the plaintiffs. Any individuals other than the plaintiffs who might claim to have been harmed by Ford have the right to bring their own lawsuit seeking damages for any alleged injuries they may have incurred. Therefore, if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiffs in this lawsuit.*

* See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1523 (2003) ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant . . . Punishment on these bases creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."); *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996); *Continental Trend Resources, Inc. v. Oxy USA, Inc.*, 101 F.3d 634, 640 (10th Cir. 1996) ("In figuring harm both actual and potential harm may be considered. But it must be harm to these plaintiffs, not to others."); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839, 839 (2d Cir. 1967) (Friendly, J.) ("The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount were awarded these would run into tens of millions, as contrasted with the maximum criminal penalty of 'imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.' . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.").

* * * * *

SPECIAL JURY INSTRUCTION NO. 28
(Punitive Damages)

In determining the proper amount of punitive damages, if any, you may not consider Ford's size, wealth, its overall profits and revenues, or its profits on the vehicle line.*

* See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1525 (2003) (because a defendant's wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm . . . . [t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damage award"); *BMW of North Am. Inc. v. Gore*, 517 U.S. 559, 574-85 (1996) (wealth of defendant irrelevant to due process analysis; the "fact that [a] defendant is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several states impose on the conduct of its business."); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994) ("[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) ("the emphasis on the wealth of the wrongdoer increase[s] the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.16 (8th Cir. 1995); *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) ("[c]orporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law."); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F.Supp. 220, 223 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation) (holding evidence of a defendant's wealth inadmissible under federal law to establish the proper amount of punitive damages

in part because, "even when considering punitive damages based on state law, the Supreme Court [in Gore] did not treat the defendant's wealth as relevant"); *American Law Institute, Reporters' Study: Enterprise Responsibility for Personal Injury*, Vol. 11, at 253-255 (1991); Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive damages in modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-52 (1989). *Cf. Adams v. Murakami*, 54 Cal. 3d 105, 119 (1991) (plaintiff must present evidence of defendant's financial condition for purposes of judicial review of award).

APPENDIX G

No. S146150
(Court of Appeal No. D045154)
(San Diego County Super. Ct. No. GIC800836)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BENETTA BUELL-WILSON and BARRY S. WILSON, *Plaintiffs and Respondents*,

v.

FORD MOTOR COMPANY and DREW FORD, *Defendants and Appellants*.

After a Decision By the Court of Appeal,
Fourth Appellate District, Division One

ANSWER TO PETITION FOR REVIEW

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* * * * *

B. In Finding Ford's Conduct "Repeated," The Court Did Not Rely On Harm To Non-Party Explorer Drivers.

Ford's final argument is its most desperate: that the Court of Appeal improperly punished it for conduct to third parties when it allegedly found Ford's conduct reprehensibly repeated, rather than isolated, "because Ford mass-marketed the Explorer [and] Bronco II." Pet. 35-37. Ford thus requests a grant and hold pending *Philip Morris USA v. Williams* (U.S. Sup. Ct. No. 05-1256), which presents the issue "whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties." 126 S. Ct. 2329 (May 30, 2006) (order granting review, limited to Questions 1 and 2 of petition); 2006 WL 849860 (Mar. 30, 2006) (Petition).

But nothing in the Opinion suggests that Ford "repeated" its misconduct by selling Explorers to multiple buyers. Rather, the court noted that "Ford had a pattern of deficient safety design that was ignored in favor of increased financial returns . . . [as] evidenced by Ford's refusal to follow its engineers' recommendations to improve the stability of the Explorer." Opinion 60-61. This has nothing to do with Explorer buyers not before the court. Instead, what makes Ford's instances of conscious disregard in designing the Explorer the latest in a string of "repeated" misconduct is (1) Ford's similar prior misconduct in designing the Bronco II and other defective vehicles (such as the Pinto at issue in *Grimshaw*) and (2) the repeated decisions its management made while designing the Explorer that each favored financial returns over the safety of the occupants of its vehicles.

APPENDIX H

Court of Appeal, Fourth Appellate District, Div. 1 – Nos. D045154/D045579
S146150

IN THE SUPREME COURT OF CALIFORNIA

En Banc

BENETTA BUELL-WILSON et al., Plaintiffs and Respondents,

v.

FORD MOTOR COMPANY et al., Defendants and Appellants.

Petition for review is DENIED.

The requests for an order directing depublication of the opinion are denied.

GEORGE
Chief Justice

APPENDIX I

IN AND FOR THE COUNTY OF SAN DIEGO
CENTRAL DIVISION

Honorable Kevin A. Enright Department 63

BENETTA BUELL-WILSON, BARRY S. WILSON,	)	
Plaintiffs,	)	
vs.	)	G1C800836
	)	Trial
FORD MOTOR COMPANY, a Delaware Corporation; and DOES 1-50, inclusive,	)	
Defendants.	)	

Reporter's Transcript of Proceedings

May 24, 2004

Reported by:

Donna L. Foster, CSR No.
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* * * * *

INSTRUCTIONS TO THE JURY BY THE COURT

If you decide that Ford Motor Company's conduct caused Benetta Wilson and Barry Wilson harm, you must decide whether that conduct justifies an award of punitive damages. The amount, if any, of punitive damages will be an issue decided later.

At this time, you must now decide whether Benetta Wilson and Barry Wilson have proved that Ford Motor Company engaged in that conduct with malice, oppression, or fraud. To do this, Benetta Wilson and Barry Wilson must prove one of the following by clear and convincing evidence;

1: That the conduct constituting malice, oppression or fraud was committed by one or more officers, directors, or managing agents of Ford Motor Company, acting in a corporate capacity;

Or 2: That the conduct constituting malice, oppression or fraud was authorized by one or more officers, directors or managing agents of Ford Motor Company;

Or 3: That one or more officers, directors or managing agents of Ford Motor Company knew of the conduct constituting malice, oppression or fraud, and adopted or approved that conduct after it occurred.

"Malice" means that Ford Motor Company acted with intent to cause injury or that Ford Motor Company's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangers, consequences of his or her conduct and deliberately failed to avoid those consequences.

"Oppression" means that Ford Motor Company's conduct was despicable and subjected Benetta Wilson and/or Barry Wilson to cruel and unjust hardship and a knowing disregard of their rights.

"Despicable conduct" is conduct that is so mean, vile, base or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that Ford Motor Company intentionally misrepresented or concealed the material fact and did so intending to deprive Benetta Wilson and Barry Wilson of property or of a legal right or otherwise to cause Benetta Wilson and Barry Wilson injury.

An employee is a managing agent if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporation policy.

IN AND FOR THE COUNTY OF SAN DIEGO
CENTRAL DIVISION

Honorable Kevin A. Enright Department 63

BENETTA BUELL-WILSON, BARRY S. WILSON,	)	
Plaintiffs,	)	
vs.	)	G1C800836
	)	Trial
FORD MOTOR COMPANY, a Delaware Corporation; and DOES 1-50, inclusive,	)	
Defendants.	)	

Reporter's Transcript of Proceedings

June 2, 2004

Reported by:

Donna L. Foster, CSR No. 7698
San Diego Superior Court
Hall of Justice, Department 63
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* * * * *

THE COURT: Ladies and gentlemen, it's about seven minutes after noon. I know we are into the lunch hour. And you have been very patient this morning. But what I would like to do is give you the instructions now, the instructions -- these instructions are additional to the instructions that I gave you before. In other words, those instructions stand. These are additional relevant to this phase. And they are not as lengthy as the instruction on the first phase. So if it's all right, I would like to instruct you then it will be submitted to you. Is that okay? Okay.

Thank you. You must now decide the amount if any you should award Benetta Wilson and Barry Wilson in punitive damages. The purpose of punitive damages are to punish a wrongdoer and to discourage -- let me ask counsel. I have I think the prior version and what we wanted to do is simply substitute the pronoun. In other words --

Let me start that last sentence over again.

The purposes of punitive damages are to punish a wrongdoer and to discourage it and others from similar conduct in the future. There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following separately for each -- for the defendant. A, how reprehensible was the defendant's conduct; B, is there a reasonable relationship between the amount of punitive damages and Benetta Wilson's and Barry Wilson's harm; C, in view of the defendant's financial condition, what amount is necessary to punish it and discourage future wrongful conduct.

You should keep in mind that compensatory damages, although awarded to compensate plaintiffs for their injuries, also may affect -- have the effect of punishing and deterring misconduct. Therefore, in determining whether and in what amount to award any punitive damages, you should consider the deterrence and punishment imposed solely by any compensatory damages you may award and when added to the sum you have already imposed as compensatory damages.

In determining the amount of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, you may consider only Ford's wrongful conduct, if any, that has had an adverse impact on the citizens of California. Accordingly, you may not award any punitive damages for the purpose of punishing Ford for the

sale of vehicles in other states for any injuries that may have occurred in other states, or for the purpose of changing Ford's conduct in other states.

Punitive damages must bear a reasonable relationship to compensatory damages.

APPENDIX J

CIVIL CODE

Division 4. General Provisions

Part 1. Relief

Title 2. Compensatory Relief

Chapter 1. Damages in General

Article 3. Exemplary Damages

Cal Civ Code § 3294 (2006)

§ 3294. When permitted

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377.62 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

No. 06-1068

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON and BARRY S. WILSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

Ford prefaces its statement of the Questions Presented with an incomplete précis of the facts. Although the jury verdict was for more than $368 million, the trial court reduced the award to $75 million in compensatory damages and $75 million in punitive damages. Petitioner's Appendix (Pet. App.) 15a. The California Court of Appeal then reduced the total compensatory damages for both plaintiffs to $27.606 million and the punitive damages to $55 million. *Id.* at 61a.

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B — Excerpts of Appellant's Petition for Review in the Supreme Court of California, filed August 28, 2006 ..... 7a

Respondents respectfully request that the Court deny the Petition for Writ of Certiorari (the Petition) seeking review of a decision of the California Court of Appeal.

STATEMENT OF THE CASE

Ford's Petition and its Supplemental Brief offer a one-sided account of the facts and evidence. The Court of Appeal's opinion (the Opinion) fairly summarizes the events that led to this litigation, the Wilsons' catastrophic injuries and the evidence at trial. Pet. App. 5a-14a.

The jury awarded Mrs. Wilson $109.6 million, and Mr. Wilson $13 million, in compensatory damages. Pet. App. 14a. It also awarded $246 million in punitive damages. *Id.* at 15a. The trial court reduced the compensatory damages to $70 million for Mrs. Wilson and $5 million for Mr. Wilson, and the punitive damages to $75 million. *Id.*

The Court of Appeal affirmed the finding of liability. Noting that Ford had not challenged the sufficiency of the evidence (*id.* at 9a), the court described the history of the Explorer's design. Ford based the Explorer on a prior SUV (the Bronco II) with a history of great instability and susceptibility to rollovers. *Id.* at 9a-10a. Although it knew of these problems, Ford retained critical Bronco II design elements bearing on stability (a narrow track width and high engine mount and center of gravity) and carried over a high percentage of parts from the Bronco II, while rebranding it as the Explorer. *Id.* at 10a. Because making the necessary design changes would have delayed the Explorer's release date, Ford management rejected repeated requests by its engineers to increase the vehicle's track width and lower its center of gravity, thus preserving a lethal feature of the Bronco II. *Id.* at 9a-10a. For cosmetic reasons, management also increased the Explorer's tire size, exacerbating the vehicle's instability. *Id.* at 11a. In subsequent years, as it modified the Explorer's design, Ford management again declined for economic reasons to improve its stability. *Id.* at 12a-13a.

The Explorer was not just unstable; it also had a weak roof structure prone to crush in a rollover. *Id.* at 8a, 13a. Rollovers in vehicles with sturdy roofs are relatively nonviolent events for passengers who are properly restrained (as was Mrs. Wilson). *Id.* at 13a. Ford could have significantly strengthened the roof for about $20 per vehicle. *Id.*

The Court of Appeal upheld Mr. Wilson's $5 million compensatory damage award and Mrs. Wilson's $4.6 million economic damage award, but reduced her noneconomic damages to $18 million. *Id.* at 36a-37a, 60a-61a. The Petition does not challenge the resultant $27.6 million award of compensatory damages.

With respect to punitive damages, the Court of Appeal found that Ford had known that the vehicle was dangerously unstable and prone to rollover in normal driving conditions; had known that the roof structure was weak and prone to collapse in a rollover; and had known of technologically and economically feasible ways to stabilize the vehicle and strengthen its roof but chose for financial reasons not to use them. *Id.* at 43a-44a. The court also found that Ford had "evinced a reckless disregard for the safety of its customers" and had engaged in "a pattern of deficient design regarding safety in favor of increased financial returns and was [*sic*] the result of the conscious disregard of Ford executives." *Id.* at 56a. It thus concluded that "the reprehensibility of Ford's conduct was high." *Id.* at 55a; *accord*, *id.* at 58a, 59a.

Nevertheless, the court reduced the punitive damages to $55 million, a ratio of essentially 2:1. *Id.* at 60a. It noted this Court's comment in *State Farm* that "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Id.* at 58a (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). In this case, however, it concluded "that a two-to-one ratio is warranted because the degree of Ford's reprehensibility is also high." Pet. App. 58a-59a. It added that "[a]n award exceeding a two-

to-one ratio would exceed the constitutional maximum . . . under the facts of this case." *Id.* at 60a.[1]

1. Ford's incomplete statement of the case demonstrates its failure to absorb any lesson from the Court of Appeal's admonition that it had "neglect[ed] to discuss the evidence in support of the Wilsons' damages at all, much less in the light most favorable to the judgment." Pet. App. 27a n.6. For example, Ford seriously misrepresents the testimony of the Wilsons' stability expert: "Respondents' expert agreed that design characteristics, other than those reflected in the stability index, affect stability. As he testified, '[y]ou can't tell until you go out and test it.'" Pet. 4 (citations omitted). Ford neglects to say that the expert *did* test the Explorer, and that it fared very poorly. Far from relying solely on paper calculations of the Explorer's stability index—as the Petition suggests (*see id.* at 3)—Plaintiffs relied on their expert's extensive stability testing of production-model Explorers, as well as the real-world tests that Ford itself had conducted, until the vehicle's tendency to roll over at 40-55 m.p.h. led Ford to abandon such tests in favor of computer simulations. *See* Pet. App. 11a; 8 RT 1281-83, 1293-1301, 1318-27; 28 RT 5059:10-13; 1 RA 164-66, 1447-49; 9 AA 2503-17.

Ford compounds these omissions by misdescribing the testing it does acknowledge. It stresses its claim that the Explorer "passed" the Consumers Union (CU) test. Pet. 5. But the CU test is not a stability test that vehicles "pass" or "fail." As conducted by NHTSA and CU, it measured the Explorer's *handling*. Pet. App. 11a; 23 RT 4115. The test entails turning at increasing speeds through a series of cones; it ends when the vehicle reaches a speed at which it starts to slide and hit cones. 20 RT 3513-16. It thus yields not a "pass" or "fail" but a maximal speed at which a vehicle can navigate the course. 20 RT 3514-15, 3645-46. If that speed is less than the speed at which the vehicle rolls over, the test will not show that rollover speed. CU and NHTSA testing thus did not show that the Explorer rolls over on flat dry roads at sub-highway speeds. But *Ford's own testing did reveal that fact*. Ford used the CU course differently, in order to test the Explorer for *rollover*. It did not stop the test when the Explorer hit a cone, but kept going in order to determine the speed at which it rolls over in accident-avoidance maneuvers like that which resulted in Mrs. Wilson's accident; that speed was 40-55 m.p.h. *See* 8 RT 1298-1303, 1318-27; 1 RA 164-66; 5 RA 1236-48, 1296-1300; 6 RA 1437, 1447-49; 9 AA 2503-17. When Plaintiffs' experts tested production-model Explorers, the results were similarly dismal.

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REASONS FOR DENYING THE PETITION

Ford has not challenged the judgment insofar as it finds liability for marketing a defective and dangerous product and awards compensatory damages. The Petition seeks review only of the award of punitive damages.

The Petition should be denied. Ford did not properly preserve any of its Questions Presented in state court. *See* Part I, *infra.* And on none of the issues presented does the opinion below conflict with a decision of this Court, a federal Court of Appeals or the highest court of a state. *See* Parts II-III, *infra.* Finally, there is no reason to remand the case for reconsideration in light of the decision in *Philip Morris USA v. Williams*, — U.S. —, 127 S. Ct. 1057 (2007), as Ford urges in its Supplemental Brief, for the Court of Appeal's opinion is fully consistent with *Philip Morris. See* Part IV, *infra.*

I. FORD DID NOT PROPERLY RAISE ANY OF ITS THREE QUESTIONS PRESENTED AT EVERY STAGE OF THE STATE COURT PROCEEDINGS.

Question 1 is whether California's punitive damages statute, as applied in this case, is unconstitutionally vague and fails to

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(Cont'd)

See 9 RT 1416-32; 20 RT 3537-43, 3546; 5 RA 1306-07; 6 RA 1615 (video).

Ford also suggests that Plaintiffs relied on evidence in ways they did not. It asserts that "Respondents' expert . . . relied on a Ford document suggesting the Bronco II had a 'rollover rate three times higher than the Chevy S-10 Blazer'" (Pet. 3 (quoting Pet. App. 10a)) and that "[w]hile admitting evidence concerning comparative rollover rates of other vehicles, the trial court refused to allow Ford to present such data *as to the Explorer itself.*" Pet. 3 But as the Opinion shows, Plaintiffs' expert briefly referred to the Ford document only to show Ford's awareness of the instability problem in the vehicle on which it based the Explorer -- and its propensity to conceal rather than fix such defects. Pet. App. 10a. The court never mentioned "evidence concerning comparative rollover rates of other vehicles" in describing Plaintiffs' case for the simple reason that they did not use such evidence to prove the Explorer's defectiveness.

provide "fair notice." Pet. i, 10-11. While Ford raised that issue in the Court of Appeal, it did not present it properly to the California Supreme Court in its Petition for Review.

Ford implies that it did so in footnote 5 of that Petition. Pet. 9. It did not. California appellate rules require that all briefs "[s]tate each point under a separate heading or subheading summarizing the point." CAL. R. CT. 8.204(a)(1)(B); *id.* 8.504(a) (subjecting petitions for review to Rule 8.204); *In re S.C.*, 138 Cal. App. 4th 396, 408 (2006). Consequently, an issue raised only in a footnote is not properly presented and is deemed waived. *See, e.g., Evans v. Centerstone Dev. Co.*, 134 Cal. App. 4th 151, 160 (2005) ("[P]laintiffs raise this issue in a two-page footnote in the introduction to the opening brief. This is a violation of court rules that require arguments to be contained in discrete sections with headings summarizing the point. We do not have to consider issues discussed only in a footnote" (citation omitted)); *Roberts v. Lomanto*, 112 Cal. App. 4th 1553, 1562 (2003) (same); *Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App. 4th 612, 624 n.2 (1992) ("We do not view as adequate to preserve an issue on appeal . . . one footnote[d] mention of [it]"). Moreover, a Petition for Review "must begin with a concise, nonargumentative statement of the issues presented for review" (CAL. R. CT. 8.504(b)(1)); the California Supreme Court ordinarily does not consider issues not expressly raised or fairly included therein. *Id.* 8.520(b)(2), (3).

Ford met none of these requirements. Its Petition for Review identified three "Issues Presented" on which review was sought (Respondents' Appendix filed herewith (Resp. App.) 10a); *vagueness/"fair notice" was not among them.* Nor do the Petition's topic headings ever mention the issue. *See id.* at 8a-9a. Indeed, the body of the Petition includes not a word about a void for vagueness or "fair notice" issue.

The issue appears only in a footnote, which is insufficient under California law. Question 1 is thus procedurally barred. *See Beck v. Washington*, 369 U.S. 541, 553 (1962) (federal claim not raised in "assignments of error" in state supreme court brief,

as required by state procedural rule, was waived, even though one sentence of brief mentioned claim).

Question 2 is whether the Court of Appeal "rendered the 'reprehensibility guidepost' a nullity." Pet. i. Ford mainly argues that the court misanalyzed "reprehensibility" when it "gave no weight to the many objective factors, such as industry custom, federal regulatory judgment, and reasonable grounds for disagreement, that significantly mitigate against any finding of reprehensibility." Pet. 24.[2]

Ford did contend in the Court of Appeal that it had met federal regulatory standards, and that experts reasonably disagree about the design issues. *See* Appellants' Opening Brief (AOB) 42-56. However, Ford presented this issue only as one of state law. *Id.* at 56 ("[A]t most . . . Ford's managers and engineers were aware of reasonably debatable safety issues and made reasonably defensible judgments about them. That cannot, *under California law*, be boot-strapped into a finding of malice") (emphasis added). Ford's opening brief never claimed that the *federal Constitution* required that weight be given to either of these factors in assessing the reprehensibility of its conduct. *See id.* at 78-79.[3] Accordingly, the claim is also procedurally barred.

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2. Ford also contends that the Court of Appeal misapplied the "reprehensibility" factor when it found that Plaintiffs were "vulnerable" (Pet. 25) and that "'Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management.'" Pet. 26 (quoting Pet. App. 57a). Ford's Petition for Review did not present either point. *See* Resp. App. 11a-15a (argument that punitive damages were excessive).

3. One paragraph in Ford's reply brief argued that federal law required the Court of Appeal, in assessing reprehensibility, to consider Ford's alleged compliance with regulations and so-called "industry custom." Appellants' Reply Br. 48. But California law precludes the raising of new issues in reply briefs. *See, e.g., Prince v. United Nat'l Ins. Co.*, 142 Cal. App. 4th 233, 238 (2006) (citing *Am. Drug Stores, Inc. v. Stroh*, 10 Cal. App. 4th 1446, 1453 (1992)). Nor did Ford frame its regulatory compliance and "industry custom" arguments in terms of federal law in its Petition for Rehearing to the Court of Appeal. *See* Pet. Reh'g 43-50.

The same is true of Ford's claim about "industry custom" (*i.e.*, comparative statistical evidence regarding the Explorer's rollover rate). Ford's opening brief in the Court of Appeal never contended that the federal Constitution required consideration of such evidence in determining the reprehensibility of conduct in order to assess the amount of punitive damages. *See* Resp. App. 5a-6a. Moreover, under California rules of appellate practice, Ford's Petition for Review adequately raised the exclusion of its comparative statistical evidence *only as an issue of state evidence law. See* Pet. Rev. 14-21. The section of the Petition discussing federal constitutional issues (*id.* at 32-37) never mentions the exclusion.[4] That claim, too, is procedurally barred.

4. The Petition asserts in passing that comparative statistical evidence "was also relevant to the due process issue of the degree of reprehensibility of Ford's conduct, and was required to be admitted as a matter of state and federal due process." Pet. Rev. 22-23. However, this sentence was placed in a section arguing that the evidence was admissible as a matter of state evidentiary law to determine whether Ford's conduct was "despicable" under Civil Code Section 3294, California's punitive damages statute. *See* Pet. Rev. 21-25 (Part I(B)); *see also id.* at 13 (Part I) (framing evidence argument as raising a state law issue). But even if it had been placed in the portion of Ford's Petition for Review expressly addressing federal constitutional issues, the single sentence in the Petition contending that due process required the admission of comparative statistical evidence would have been insufficient under California's rules of appellate procedure to present this issue to the California Supreme Court. *See, e.g., Tilbury Constructors, Inc. v. State Comp. Ins. Fund*, 137 Cal. App. 4th 466, 482 (2006) (applying Rule 8.204(a)(1)(B) (as then numbered) to reject party's attempt to raise issues "[i]n a single sentence in its opening brief contained within its arguments about [another issue]").

Nor did the Petition for Review's statement of "issues presented" include the "due process/comparative statistics" issue. *See* Resp. App. 10a. A single sentence in the Petition's body does not comply with the California Supreme Court's requirement, discussed at p. 5, *supra*, that every Petition "must begin with a concise, nonargumentative statement of the issues presented for review" (CAL. R. CT. 8.504(b)(1)) and that only those issues will normally be considered by that court.

Finally, even if Ford had adequately presented this issue to the California Supreme Court, the Court of Appeal also affirmed the exclusion of Ford's comparative rollover evidence as unreliable and misleading under California law. *See* Pet. App. 23a-24a. Hence, the exclusion of this evidence rests on an adequate and independent nonfederal ground having nothing to do with Ford's belated federal claims.

Question 3 is whether the Due Process Clause prohibits "punish[ing] a manufacturer for selling products not at issue in the case" or "for selling products . . . to third parties not before the court." Pet. i. Ford did not preserve that issue either.

As explained below (*see* pp. 20-21, *infra*), Ford did propose a jury instruction touching on this issue. But it did not contend before the Court of Appeal or California Supreme Court that the refusal to so instruct the jury was error, let alone of constitutional dimension. (And it was not error: as explained on pp. 20-21, *infra*, the instruction misstated the law.)

While Ford did complain to the Court of Appeal that Plaintiffs had asked the jury to punish it for Bronco II injuries suffered by non-parties (*see* AOB 14-15; Appellants' Reply Br. 4-5), Ford had and has forfeited that claim in no less than three ways (two at trial and one on appeal). At trial, Ford never objected to the parts of Plaintiffs' closing that it now claims improperly sought punishment for non-party injuries, thus failing to preserve the issue. *See, e.g.*, *People v. Gray*, 37 Cal. 4th 168, 215 (2005), *cert. denied*, 127 S. Ct. 38 (2006). Moreover, Ford itself proposed an instruction authorizing the jury to consider evidence of harm to non-parties. *See* pp. 28-29, *infra*. And on appeal, Ford raised Bronco II-related jury arguments only in the part of its brief challenging the use of Bronco II evidence *as a matter of state law* (AOB 14-15)—not in those addressing punitive damages. *Cf.* Resp. App. 2a-4a.; AOB 40-63, 74-79. In California appellate practice, a passing reference to the federal Constitution in the text of an argument about state evidence

law does *not* preserve a federal constitutional claim. *See* CAL. R. CT. 8.204(a)(1)(B) and authorities cited at p. 5, *supra*.

In the wake of *Philip Morris*, Ford suggests that Plaintiffs offered not just jury arguments but evidence of non-party injuries suffered in Bronco IIs or Explorers. Supplemental Brief for Petitioner (Supp. Br.) 4-8. Ford cites no such evidence in the record because, as discussed below (*see* pp. 24-26, 27 n.14, *infra*), there is none. But even if there were, Ford's Petition for Review did not challenge its admission. *Cf.* Resp. App. 8a-9a.

That Petition did briefly contend that the Court of Appeal had "found Ford's conduct 'more reprehensible' because it was 'repeated and not an isolated incident' based on the fact that Ford mass-marketed the Explorer [and] Bronco II." Resp. App. 14a (quoting Pet. App. 56a-57a).[5] But neither the paragraph from which Ford quotes the "repeated not isolated" passage (*see* Pet. App. 56a-57a) nor any other part of the Opinion mentions the mass-marketing of those SUVs as a reason Ford's conduct was reprehensible. Because the Opinion never *states* the proposition that Ford attributes to the court (*i.e.*, that mass-marketing turns the design and sale of a defective product into "repeated misconduct"), Ford's argument must be that the Court of Appeal relied on that idea *implicitly*, without examining its correctness.[6] But to preserve *that* argument for review, California law required Ford to call the Court of Appeal's alleged (and assertedly erroneous) assumption to that court's attention in a petition for rehearing. CAL. R. CT. 8.500(c); *In re Marriage of Goddard*, 33 Cal. 4th 49, 53 n.2 (2004); *Sweatman v. Dep't of Veterans Affairs*,

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5. *Philip Morris* makes clear that a jury may, in evaluating the reprehensibility of a manufacturer's conduct, consider the disregard for public safety inherent in knowingly selling dangerous products. *See* pp. 21-22, *infra*.

6. In reality, the Court relied on no such idea: it found Ford's misconduct "repeated" because Ford repeatedly made choices sacrificing public safety for profits and production schedules, through the long history of the Bronco II and successive models of the Explorer. *See* p. 23, *infra*.

25 Cal. 4th 62, 68 n.1 (2001).[7] Ford did not do this: the treatment of mass-marketing as repeated misconduct, or indeed the imposition of punishment based in any way on third-party injuries, is one of the few issues that Ford's 68-page Petition for Rehearing did *not* raise. Accordingly, Ford failed to preserve any such issue.

Summary. Not one of the issues Ford now presents was properly raised at every stage of the proceedings below. Moreover, Question 2 is also barred, insofar as it concerns comparative statistical evidence, because the Court of Appeal's affirmance of the ruling excluding this evidence rests on an adequate and independent state law ground.

II. FORD'S VAGUENESS CLAIM PRESENTS NO ISSUE MERITING CERTIORARI.

Ford's vagueness argument is really a quarrel with California law that it has tried to repackage as a federal question. Ford first contends that the Court of Appeal "dismissed as *irrelevant* all objective standards," including "compliance with federal regulations and policy judgments, and the existence of an objectively reasonable disagreement in the engineering community," in awarding punitive damages. Pet. 13 (emphasis added). It then argues that this decision has rendered the state's punitive damages statute (CAL. CIV. CODE §3294) void for vagueness, at least as applied to it. Pet. 9-22. Even if Ford had properly presented this issue to the California Supreme Court, it would not merit certiorari.

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7. California Rule of Court 28(c) (now Rule 8.500(c)) provided that "[a]s a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal" (*id.* 28(c)(1)) and that the Supreme Court "normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." *Id.* 28(c)(2). Here, the "opinion's statement of the issues" never mentions mass-marketing as a basis for finding reprehensibility; the California Supreme Court was entitled to accept that framing of the issue.

In the first place, the argument's premise is demonstrably false. Ford contended below that, *as a matter of California law*, those circumstances preclude punitive damages. The Court of Appeal did hold that compliance with federal regulations and the existence of disputes in the engineering community are not absolute defenses to an award of punitive damages. Pet. App. 43a-51a. However, it did not hold that evidence of compliance with federal standards or of engineering disputes was irrelevant or inadmissible. Indeed, Ford was free to present evidence in the trial court concerning its claimed regulatory compliance and the views of its experts as to the design and safety issues pertinent to this case, and it did so. *See, e.g.*, 2 AA 528-35; 10 AA 2618-56; 10 RT 1723-36; 28 RT 5145, 5179 (regulatory compliance); 28 RT 5152-54, 5164-67; 3 AA 716-19, 756 (expert disagreement); *cf., e.g.*, 3 AA 605-717 (NHTSA's decision not to regulate stability). Similarly, the trial court did not preclude Ford's counsel from arguing to the jury that it should not award punitive damages, or should lessen their amount, because Ford (allegedly) complied with regulations and/or because some experts support its design decisions. Ford's vagueness argument thus rests on misstatements of what the California trial court did and what the Court of Appeal held.

Moreover, Ford concedes that "the California punitive damage standard is theoretically capable of rational application in many circumstances" (Pet. 12) and that it "is making an as-applied challenge, and is not arguing that the statute is unconstitutional on its face." *Id.* at 13 n.2. This concession necessarily narrows the range of cases to which the principles Ford advocates might be applied, thereby diminishing the importance of review in this case.

Even as applied to products liability cases, Ford's vagueness argument is unworthy of review. That argument is premised on two propositions: (1) that "California's standards for determining strict liability for defective product designs are exceedingly vague and subjective" (Pet. 11-12); and (2) that an automobile manufacturer cannot "determine, in advance, if its design

decisions . . . would subject it to punishment in California, and [is left] with no guidance as it makes day-to-day design decisions about what might subject it to punitive damages." Pet. 14. The first of these propositions is not properly before the Court. Ford's Petition challenges only the award of punitive damages. Having chosen not to contest its liability for compensatory damages under California tort law, Ford has no standing to complain that California's standards for imposing such liability are unconstitutionally vague. *See Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982) (because "'[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand,' '[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness'") (citations omitted).

The same principle precludes Ford from arguing that California's punitive damages standards are unconstitutionally vague as applied to it. The evidence established that Ford knowingly produced and sold an automobile that (1) would roll over in normal driving conditions and on dry pavement if a driver swerved to avoid an obstacle, (2) had a roof so weak that it would collapse during a rollover and (3) could easily have been made more stable and given a stronger roof through well-known, available and cost-effective design changes. Pet. App. 43a. Yet Ford declined for profit-maximization reasons to make feasible and affordable design corrections urged by its own engineers. *Id.* at 10a, 12a-13a. Thus, however California punitive damages law may be applied in other cases, Ford unquestionably had notice that its conduct could result in punitive damages liability. Indeed, courts in California, among other states, had instructed Ford on that very subject before. *See Hasson v. Ford Motor Co.*, 32 Cal. 3d 388 (1982) (Continental); *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (2003) (Bronco); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981) (Pinto); *see also, e.g., Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. Ct. App. 1999) (Bronco II).

In any event, Ford's suggestion that California's punitive damages standards are unconstitutionally vague is meritless. Ford cites a great many of this Court's vagueness opinions from 1915 to 1966 involving dissimilar statutes applied in dissimilar contexts. Pet. 15-18. But its reliance on these dissimilar cases ignores the principle that "rules against vagueness are not 'mechanically applied,' but depend in their application, on 'the nature of the enactment.'" *Barclays Bank, PLC v. Franchise Tax Bd.*, 512 U.S. 298, 316 (1994) (citation omitted). Consequently, the relevant vagueness cases—which Ford altogether ignores—are this Court's two much more recent decisions rejecting similar vagueness challenges to punitive damages laws far less specific than California's. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 465-66 (1993) (plurality opinion) ("the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-20, 24 n.12 (1991).[8] (Ford's statement (Supp. Br. 2) that "[t]his Court has never directly addressed the due process constraints on the imposition of punitive damages liability in the first instance" is obviously incorrect.) Indeed, Ford cites no case holding a punitive damages statute unconstitutional, and makes no mention of decisions rejecting similar vagueness challenges to punitive damages laws. *See, e.g., White v. Ford Motor Co.*, 312 F.3d 998, 1026 (9th Cir. 2002); *Dunn v. HOVIC*, 1 F.3d 1371, 1381-82 (3d Cir. 1993) (en banc).

In comparison to the punitive damages statutes upheld in *TXO* and *Haslip*, the California statute gives prospective defendants ample notice. It requires "clear and convincing

8. Justice O'Connor dissented in *Haslip*, arguing that Alabama's punitive damages law—which was implemented by an instruction telling the jury that "[i]mposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so" (*see* 499 U.S. at 6 n.1)—was void for vagueness. *Id.* at 42-53. No other member of the Court joined that dissent.

evidence that the defendant has been guilty of oppression, fraud, or malice." CAL. CIV. CODE §3294(a). It defines "malice" as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." *Id.* §3294(c)(1). Moreover, this jury was instructed (in accordance with California precedent) that "'[d]espicable conduct' is conduct that is so mean, vile, base or contemptible that it would be looked down on and despised by reasonable people." 35 RT 8281.[9] The California Supreme Court has explained that the requirement to show "despicable" conduct "represent[s] a new substantive limitation on punitive damage awards." *Coll. Hosp., Inc. v. Superior Ct.*, 8 Cal. 4th 704, 725 (1994).

These standards go far beyond those previously upheld by this Court, and ensure that punitive damages are imposed only on defendants whose conduct merits punishment. Accordingly, they are not unconstitutionally vague, especially as applied to Ford's reprehensible conduct here.

III. THE OPINION'S ANALYSIS OF REPREHENSIBILITY PRESENTS NO ISSUE MERITING CERTIORARI.

Ford contends that the Court of Appeal violated the federal Constitution because, in assessing the reprehensibility of Ford's conduct, it "gave no weight to the many objective factors, such as industry custom, federal regulatory judgments, and reasonable grounds for disagreement, that significantly mitigate against any

9. Likewise, in the trial's second phase, which decided the amount of punitive damages, the court also gave standard California instructions far more detailed than the one upheld in *Haslip*. Among other things, it told the jury that "[i]n deciding the amount of punitive damages, if any, you should consider . . . A, how reprehensible was the defendant's conduct; B, is there a reasonable relationship between the amount of punitive damages and Benetta Wilson's and Barry Wilson's harm; C, in view of the defendant's financial condition, what amount is necessary to punish it and discourage future wrongful conduct." 41 RT 8527.

finding of reprehensibility." Pet. 24. As already noted, this contention was not properly presented below, and challenges a ruling that rests in part on an adequate and independent non-federal ground. *See* pp. 5-8, *supra.*

In any event, Ford's argument presents no issue meriting certiorari. Ford cites no case holding that either factor, if established, is an absolute bar to punitive damages. And to the extent its argument, toned down from its California submission, is merely that compliance with applicable regulations or reasonable disagreement among experts are factors to be taken into account in determining the degree of reprehensibility, and therefore the maximum constitutionally permissible ratio between punitive and compensatory damages, neither the Court of Appeal nor Plaintiffs disagree. As noted above, Ford was free to argue, in both the trial court and the Court of Appeal, that compliance with regulations and the existence of a reasonable disagreement between experts were reasons not to award punitive damages at all, or to reduce the amount of the award. *See* pp. 6, 11, *supra.* There is no reason to think these arguments fell on deaf ears: after all, the trial judge reduced the punitive damages award from $246 million to $75 million, and the Court of Appeal reduced it further, to $55 million.

The reason why Ford's arguments for mitigation didn't reduce the punitive damages further still was that those arguments suffered from a weak factual basis. As the Court of Appeal pointed out, "there are no federal standards for stability of vehicles, one ground upon which Ford's liability for punitive damages is based." Pet. App. 49a-50a; *see also Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1218 (11th Cir. 1999). Nor are there any federal regulatory standards regarding roof-strength warnings, another ground for liability.[10] And, as the Court of

10. Although one non-preemptive federal regulation does govern roof structure, there was a serious factual dispute at trial, never resolved by a jury finding, as to whether Ford had complied with it. *See* 12 RT 2136-37, 2141-42 *and* 10 AA 2621 (evidence that Ford only passed

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Appeal also emphasized, federal automobile safety regulations expressly do not preempt state law liability for defective vehicles (49 U.S.C. §30103(e)) and thus do not "'affect the rights of parties under common law particularly those related to warranty . . . and tort liability.'" Pet. App. at 48a-49a (emphasis omitted) (quoting H.R. Rep. No. 89-1776, at 24 (1966)).

As for the claimed disagreement among experts, the Court of Appeal found that Ford engineers had proposed design changes that would have improved the Explorer's stability, but that management rejected them because implementation "would have delayed the vehicle's release date and impacted profits." Pet. App. 9a-10a, 12a. Ford presented *no* evidence that its management had relied on any recommendations by Ford safety engineers *against* the rejected safety proposals. Nor did it present any evidence that its management had studied any debate among outside safety experts. Nothing in the record suggests that Ford's management made anything but a pure business decision—not one based on that management's good-faith, reasonable review of an engineering disagreement.

Even if these factors gave *some* support to Ford's argument for mitigation of the punitive damages award, there would be no reason for this Court to review whether the California courts weighed those factors correctly. In the end, the Court of Appeal reduced the punitive damages beyond the trial court's reduction, resulting in a ratio of 2:1. Nothing in its analysis contradicts the standards established in *State Farm* or either of the decisions claimed by Ford to be in conflict with the decision in this case.

The opinion here is consistent with (and in critical respects distinguishable from) *Clark v. Chrysler Corp.*, 436 F.3d 594, 602 (6th Cir. 2006). The panel majority in *Clark* did reduce a $3 million punitive damages award to roughly $470,000, based

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FMVSS 216 roof crush test by improper means); 12 RT 1980, 2131-32 (evidence that many Explorers on the road have roofs too weak to pass test).

in part on the existence of a good-faith dispute over the need to test the strength of the failed part at issue. 436 F.3d at 602; *cf. id.* at 614 (Moore, J., dissenting in part) (finding award not excessive). But the *Clark* majority found that, in light of the scientific dispute and other evidence, the maximum constitutionally permissible ratio of punitive to compensatory damages was 2:1 (*id.* at 600); the dissenting judge found the original ratio of 13:1 *not* excessive. *Id.* at 614 (Moore, J., dissenting in part). *Clark* hardly supports an attack on an award bearing the very ratio it *upheld.*

Moreover, in *Clark* "there [was] no evidence that a boxed-in B-pillar [*i.e.*, plaintiff's alternative design] would have prevented the harm suffered by Mr. Clark." *Id.* at 602. Accordingly, Clark's experts "did not conduct any tests to see whether another B-pillar would have prevented [the accident] under similar circumstances." *Id.* In contrast, there was ample evidence in the present case that greater stability *or* a stronger roof *or* a warning about the roof's weakness would have prevented the injuries suffered by Mrs. Wilson. Pet. App. 8a-9a, 13a, 14a; 9 RT 1391-92; 19 RT 3420-23; 20 RT 3543; 12 RT 2159; 15 RT 2642-43, 2668-69; 25 RT 4495-96; 26 RT 4657. In particular, Plaintiffs' expert based his testimony that Plaintiffs' proposed alternative designs would have prevented the harm suffered by the Wilsons in significant part on extensive independent testing. *See* note 1, *supra* (citing expert testimony, and documentation and videos of testing, presented to jury). Moreover, the *Clark* majority expressly found that Chrysler was *not* a recidivist: "In this case, there is no evidence that Chrysler knew that its use of the unboxed B-pillar could cause Mr. Clark's injury. Indeed, there is no evidence of earlier, similar accidents that might have alerted Chrysler to the problem." 436 F.3d at 604–05 (footnote omitted). In this case there was ample evidence of Ford's recidivism: the contrast between Chrysler's lack of notice in *Clark*, and the trail of "earlier, similar accidents"

involving the Bronco II that had alerted Ford to the danger of instability,[11] could not be starker.

Ford also contends that the decision below conflicts with *Clark* and *Baker v. ExxonMobil Corp.* (*In re: Exxon Valdez*), 472 F.3d 600 (9th Cir. 2006), because the Court of Appeal said that automobile consumers "were vulnerable as they would not understand vehicle design, development and manufacture, and would rely on Ford to inform them of risks as they made purchasing decisions." Pet. App. 56a. There is no conflict. *Clark* held that *Chrysler's* wealth could not be considered in determining the vulnerability of the *plaintiff*. 436 F.3d at 604. The Court of Appeal made no such error in this case.[12] In *Exxon Valdez*, there was no "dispute that subsistence fisherman were financially vulnerable" (472 F.3d at 616-17); the Ninth Circuit merely held that Exxon had "not *intentionally* target[ed] subsistence fisherman." *Id.* (emphasis added). Neither *Clark* nor *Exxon Valdez* hinted, let alone held, that courts analyzing reprehensibility must ignore "vulnerability" of an injured party that is due to a lack of specialized knowledge on an esoteric scientific topic like automobile safety engineering, or an inability to obtain adequate information on that issue. Ford cites no case so holding. There is no conflict for this Court to resolve.

Finally, Ford claims that, because it assertedly won eleven Explorer cases before the trial of this case, the Court of Appeal

11. *See Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 545-49, 556-57, 562 (Ind. Ct. App. 1999); *Clay v. Ford Motor Co.*, 215 F.3d 663, 665 (6th Cir. 2000); *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 733 (N.Y. 1995); *see also* 9 AA 2527-53, 2565-82; 5 RA 1273 (evidence Ford knew that roof crush causes injury in rollovers).

12. Ford misrepresents the opinion below as having said that "'[t]he defendant's financial condition is an essential factor in fixing an amount'" of punitive damages (Pet. 25) without so much as an ellipsis to indicate that the sentence continued as follows: ". . . that is sufficient to serve these goals without exceeding the necessary level of punishment." Pet. App. 51a. Accordingly, the Court of Appeal did not endorse use of the defendant's wealth in evaluating the plaintiff's vulnerability—the trial court's error in *Clark*.

erred in finding its conduct "repeated and not an isolated incident." Pet. 27 (citing Pet. App. 56a-57a). The trial court refused to allow Ford to use prior verdicts in its favor (41 RT 8516, 8534-37), and Ford did not challenge this ruling on appeal or, for that matter, in its Petition for Review. (Significantly, two of the verdicts have since been *reversed*, with directions to exclude on retrial the comparative rollover statistics that the trial and appellate court excluded in the present case. *See Jaramillo v. Ford Motor Co.*, 116 Fed. Appx. 76, 78-79 (9th Cir. 2004); *Hockensmith v. Ford Motor Co.*, 116 Fed. Appx. 244 (11th Cir. 2004)). In any event, Ford's premise—that it was punished for "repeated" sales of Ford Explorers to other persons—is false. *See* Part IV, *infra*. That juries in other cases, presented with different witnesses and evidence by different lawyers, came to different conclusions than the jury in this case has no bearing on whether the conduct Plaintiffs proved in this case was reprehensible.

IV. NOTHING IN *PHILIP MORRIS* SUPPORTS FORD'S PETITION.

Ford asked the Court to hold the Petition until it announced a decision in *Philip Morris USA v. Williams*, __ U.S. __, 127 S. Ct. 1057 (2007). The Court announced that decision on February 20. Ford then filed its Supplemental Brief. However, nothing in *Philip Morris* supports any argument in the Petition or warrants a remand.

A. Ford Did Not Preserve Any Issue Affected By *Philip Morris*, Precluding A Grant And Remand.

1. Ford Did Not Preserve The Substantive Issue Addressed In *Philip Morris*.

In its Supplemental Brief, Ford urges the Court to grant certiorari in order to remand for reconsideration in light of *Philip Morris*. But the Court has power to grant, vacate and remand only if Ford's petition satisfies the jurisdictional requirements of 28 U.S.C. §1257(a).

As shown in Part I, at pp. 8-10, *supra*, it does not: Ford did not properly preserve the issue that would be the subject of a grant, vacate and remand order. Ford's complaint is that the Court of Appeal improperly punished it for mass-marketing Explorers and Bronco IIs to third parties. Because Ford did not adequately present this issue as one of federal law, or raise it in a petition for rehearing as California law required, the Court lacks jurisdiction of it.

2. Ford Did Not Preserve An Instructional Error Claim.

An issue raised (but not resolved) in *Philip Morris* was whether the trial court erred in refusing to instruct the jury that it could "consider the extent of harm suffered by others in determining . . . [the] reasonable relationship" between plaintiff's harm and punitive damages, but could not "punish the defendant for the impact of its alleged misconduct on other persons." *Philip Morris*, 127 S. Ct. at 1061. As the Court noted, the instruction Philip Morris had proposed "distinguishe[d] between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment" (which it would not). *Id.* at 1064.

Ford proposed no such instruction. Its proposal, which the trial court rejected, was erroneous and one-sided:

> In determining the appropriate amount of punitive damages, if any, in this case, you may consider only the harm to the plaintiffs. Any individuals other than the plaintiffs who might claim to have been harmed by Ford have the right to bring their own lawsuit seeking damages for any alleged injuries they may have incurred. Therefore, if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiffs in this lawsuit. (Pet. App. 103a)

Unlike Philip Morris's instruction, Ford's would have barred the jury from considering Ford's overall conduct in

determining reprehensibility. Because that instruction did not completely state the governing legal principles, the trial court properly rejected it under California law. *E.g.*, *Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists*, 227 Cal. App. 2d 675, 716-17 (1964) (judge has no duty to rewrite incorrect instructions). The refusal thus rests on an adequate and independent state ground.

In any event, no instructional error issue has been preserved. Before the Court of Appeal and in its Petition for Review, Ford did not claim—even on state law grounds and certainly not on federal constitutional grounds—that the trial court incorrectly instructed the jury or erred by refusing to give the foregoing instruction. *See* Resp. App. 2a-4a, 8a-9a.

B. The Court of Appeal Did Not Punish Ford For Injuring Occupants Of Other Ford Vehicles.

Ford claims that the Court of Appeal punished it "for its sales of the Explorer—as well as the Bronco II—to third parties not before the court." Pet. 2-3. Even if that argument had been properly preserved, it would still rest on a misreading of the Opinion. In fact, the Court of Appeal evaluated the punitive damages award in prescient accord with the principles this Court later enunciated in *Philip Morris*.

1. The Principles Set Forth In *Philip Morris*.

Philip Morris draws a line between "show[ing] harm to others in order to demonstrate reprehensibility" and "punish[ing] a defendant directly on account of harms it is alleged to have visited on nonparties." 127 S. Ct. at 1064. While barring the latter, the Court affirmed the propriety of the former:

> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . . (*Id.*)

The Court later reiterated its "recogni[tion] that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." *Id.* at 1065.

After noting the heightened reprehensibility of acts that threaten harm to many victims, the Court further invoked the principle, derived from criminal recidivism cases, that an act is more reprehensible if it is the latest in a string of similar misdeeds. *Id.* (describing *Witte v. United States*, 515 U.S. 389, 400 (1995), as holding that "recidivism statutes taking into account a criminal defendant's other misconduct do not impose an additional penalty for the earlier crimes, but . . . a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one") (citation and internal quotation marks omitted). In short, *Philip Morris* affirms that a manufacturer's long history of disregard for public safety can be considered in evaluating the "reprehensibility" of its conduct toward the plaintiff.

2. The Opinion Accords With *Philip Morris*.

Although we discuss below Ford's mistaken assertions that the trial transcript includes evidence or closing arguments inconsistent with the above principles (*see* Part IV(B)(3), *infra*), the crucial point is that the Opinion adheres to those principles. What most matters to the Court's exercise of its certiorari jurisdiction, after all, is not passages in a trial transcript but the text of the published appellate opinion allegedly creating confusion or conflict in the law.

That text in no way suggests that Ford was or should be punished for selling Explorers (or Bronco IIs) to multiple buyers. The passages of which Ford complains are all in a section of the Opinion headed "Reprehensibility of conduct." Pet. App. 55a. They form part of the Court's analysis of the "reprehensibility" of Ford's conduct—an analysis concluding that, because "the degree of Ford's reprehensibility is . . . high," a "two-to-one ratio is warranted." Pet. App. 59a. There is no dispute that this is how the Court of Appeal used Ford's past conduct: Ford's Petition for Review acknowledged that the court had analyzed its past conduct *as relevant to reprehensibility*. *See* p. 9, *supra* (quoting Resp. App. 14a).

As part of that reprehensibility analysis, the Opinion notes that "Ford had a pattern of deficient safety design that was ignored in favor of increased financial returns . . . [as] evidenced by Ford's refusal to follow its engineers' recommendations to improve the stability of the Explorer." Pet. App. 57a. This conclusion had nothing to do with punishing Ford for injuries suffered by other Explorer occupants. What made Ford's design and marketing of the Explorer that injured the Wilsons reprehensible were (1) Ford's similar disregard of public safety in designing the Bronco II; (2) its decision to carry over, into the Explorer, design features that made the Bronco II unstable and unsafe, despite its own engineers' recommendations to make the design safer; (3) its disregard of prior product liability judgments and punitive damage awards regarding the Bronco II when it designed and produced the successor vehicle that injured the Wilsons; and (4) its repeated failure to correct the original Explorer's stability and roof strength defects in successive models, even though it was feasible and cost-effective to do so, because Ford favored maximizing financial returns and meeting production schedules over ensuring the safety of Explorer occupants. *See* Pet. App. 9a-10a, 12a-13a, 43a-44a, 56a-57a.

The reprehensibility of Ford's failure to correct the Bronco II's safety defects when it produced the Explorer is underscored by a string of decisions finding the Bronco II to be dangerous and defective, and often imposing significant punitive damages. *See, e.g.*, *Watkins*, 190 F.3d at 1216-18; *Ammerman*, 705 N.E.2d at 556-57, 562. Yet Ford produced a new-generation vehicle, rebranding it "the Explorer," without correcting its predecessor's fundamental stability defects. To consider, as part of a reprehensibility analysis, a manufacturer's wrongful acts in designing a related series of defective products over an extended period differs entirely from punishing that manufacturer for the injuries caused to non-parties because it mass-produced a single product, or for the injuries caused to non-parties by the prior,

related products. *See Philip Morris*, 127 S. Ct. at 1065; *Witte*, 515 U.S. at 400.

In sum, the Opinion does not punish Ford for the injuries that the Explorer's design defects have caused non-parties. Instead, it bases its calculation of punitive damages on the $27.6 million in compensatory damages received by the Wilsons. That base, by definition, includes compensation only for *their* injuries; it includes no dollars intended to compensate non-parties (or punish Ford) for such persons' injuries. The Court of Appeal did then consider Ford's recidivism in determining that Ford's behavior was sufficiently reprehensible to warrant an award of punitive damages equal to twice the compensatory damages base. That calculus was entirely consistent with *Philip Morris*.

3. The Opinion Does Not Allow Improper Uses Of Evidence Or Jury Arguments Of Any Sort Rejected In *Philip Morris*.

Trying to shoehorn this case into the analysis in *Philip Morris*, Ford contends that "'the sort of evidence that was introduced at trial [and] the kinds of argument the plaintiff made to the jury'" created an undue risk that the jury punished Ford for harming third persons. Supp. Br. 10 (quoting *Philip Morris*, 127 S. Ct. at 1065). Neither part of that contention is correct (or properly preserved; *see* Part I, *supra*).

a. Plaintiffs Did Not Offer Improper Evidence Of Bronco II Injuries.

Ford did complain in the Court of Appeal, as in its Supplemental Brief, about the admission of evidence of the Bronco II's *instability*. Supp. Br. 4-6. However, Ford does not cite even a shred of evidence submitted to the jury of *injuries* suffered by third parties in Bronco IIs—and there wasn't any. *Cf. id.*; Pet. 29 (citing only (1) evidence of Bronco II *instability* and (2) arguments of counsel).[13] The trial court properly admitted

13. The trial court of course instructed the jury that arguments of counsel are not evidence (35 RT 8155; 41 RT 8505)—an instruction (Cont'd)

evidence of the Bronco II's instability, and Ford's knowledge thereof, in order to show the history of the Explorer's development (*e.g.*, Ford documents assessing the Explorer's stability in light of the Bronco II's known deficiencies) and to show Ford's notice of the problem and of the need to fix it. Pet. App. 17a-20a. The notice issue concerned Ford's liability for punitive damages in the first place, and the reprehensibility of its conduct—not the amount of harm it had caused.

There is a qualitative difference between evidence that a manufacturer knew that a predecessor product had the same defect as the product at issue, on the one hand, and evidence of the actual harm that the past defect did to non-parties, on the other. If Plaintiffs had offered the latter sort of evidence—*e.g.*, expert testimony detailing the number of Bronco II rollovers and calculating the amount of harm they had caused to non-parties—Ford would have had something to complain about. But as Ford's lack of record citations reveals, Plaintiffs did no such thing.

b. Plaintiffs Made No Improper Arguments About Bronco II Injuries.

Nor did Plaintiffs' counsel urge the jury to punish Ford for the harm suffered by Bronco II victims. Ford block-quotes two passages in Plaintiffs' closing argument mentioning the Bronco II. Supp. Br. 5. Ford contends that these passages fall on the wrong side of the "use to measure reprehensibility"/"use to punish for non-party injuries" line, but that is false. Here is the key passage:

> Ford is aware by 1989 that many people are killed or seriously injured in [Bronco II] rollovers. Right in this time period, and they are going out to market with this new launch [*i.e.*, the Explorer] with Job 1

(Cont'd)

that California law presumes the jury to have followed. *See, e.g.*, *People v. Stitely*, 35 Cal. 4th 514, 559, *cert. denied*, 126 S. Ct. 164 (2005); *Karlsson v. Ford Motor Co.*, 140 Cal. App. 4th 1202, 1229 (2006).

> with the engineers telling them [of] the same problems. (35 RT 8173-74 (*quoted at* Supp. Br. 5))

Counsel could not have made the point more clearly: he alluded to people hurt in Bronco II rollovers not to include those third parties' injuries in the pool of harm on which the jury would base Ford's punishment, but only to show that "Ford [was] aware" of the instability problem, yet went "to market" with the Explorer "with the engineers telling them [that] the same problems" remained. That awareness enhances the reprehensibility of Ford's conduct. However, the basis for calculating the amount of Ford's punishment—*i.e.*, the amount of harm to be multiplied by the reprehensibility factor—was limited to the harm that the Wilsons suffered as a result of those "same problems."

While the other block-quoted passage does refer to the Bronco II having killed or injured many people (35 RT 8172), one must view that brief comment in context—*i.e.*, as promptly followed by the "new launch . . . same problems" passage quoted above in this brief. The latter passage tied together counsel's points about the Bronco II into a single description of how Ford's pattern of disregard for the danger of instability began with the Bronco II and carried over—along with that vehicle's basic design flaws—to the original Explorer and, ultimately, the 1997 Explorer that injured the Wilsons. The persistence of that disregard for safety increases the reprehensibility of the conduct that injured the Wilsons, but it was only for their injury that Plaintiffs asked the jury to punish Ford. The Bronco II evidence merely helped show that that injury was no unforeseen mishap, but the latest in a string of eminently foreseeable results of conscious choices.

c. The Opinion Does Not Endorse Improper Arguments About Non-Party Explorer Injuries.

After discussing the Bronco II, the Supplemental Brief quotes passages in Plaintiffs' closing argument allegedly seeking punishment for non-party injuries caused by other Explorers.

Supp. Br. 6-7.[14] The p[illegible]ges do no such thing, and would not warrant a grant of certi[illegible]ri even if they did.

(1) Other Explorer Cases Are Outside The Record.

Preliminarily, Ford complains that these alleged arguments were unfair because "Ford had won the prior eleven cases involving these defect claims, and there was no actual evidence of other injuries, their proximate causes, severity, or how this alleged threat to other drivers compared to that of other SUVs." *Id.* at 6.

This argument goes outside the record and is therefore improper. There is no evidence in the trial record of any of those alleged eleven prior verdicts.[15] *A fortiori*, Ford did not introduce "actual evidence of [the] other injuries, their proximate causes, [or] severity" in the prior cases or otherwise lay a foundation in the record that the accidents or injuries made those cases substantially similar to this case.[16]

(2) The Quoted Arguments Are Not Improper.

Ford's arguments must therefore rest on the four passages of argument it block-quotes. *See* Supp. Br. 7. But those passages will not bear the weight. The first and fourth in no way mention other Explorer rollover accidents, let alone injuries suffered by

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14. Notably, Ford does *not* claim that Plaintiffs put before the jury improper *evidence* of non-party injuries suffered in Explorer rollovers.

15. Ford proffered such evidence at the time of Phase II closing arguments (41 RT 8534-37); the trial court excluded it (*id.*); and Ford did not challenge the exclusion on appeal.

16. While Plaintiffs do not expect that the Court will consider alleged facts lacking a valid foundation in the record—let alone the alleged "additional victories" after trial mentioned in Ford's Petition (Pet. 27)—we note that, if the Court expanded its inquiry beyond the record, it also would find a comparable number of other Explorer cases involving instability and/or roof crush in which the *plaintiffs* have prevailed.

non-parties in such accidents. They merely note the *potential* harm to other drivers caused by Ford's conduct—the very type of argument this Court approved when it noted in *Philip Morris* that "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." 127 S. Ct. at 1065.

The second passage does note "[h]undreds of Explorer rollover cases" but *not* in order to make the injuries suffered in those accidents the base for calculating punitive damages. Rather than mention injuries—let alone suggest their monetary value—counsel immediately explained the relevance of the long line of cases: it shows "Ford management's willingness to accept this risk from the Bronco II through the [1997 Explorer]." 35 RT 8179 (*quoted at* Supp. Br. 7). It shows, in other words, that Ford's conduct toward the Wilsons was reprehensible because it was the latest instance in a long string of similar, uncorrected misconduct. *See Philip Morris*, 127 S. Ct. at 1065 (approving use in punitive damages context of principle that recidivist's "latest crime . . . is considered to be an aggravated offense because a repetitive one") (citations and internal quotation marks omitted).

Similarly, the third passage notes that Mrs. Wilson's accident was not "a single isolated incident," as there were "others in California." But again, counsel never mentioned or alluded to injuries suffered in those accidents or invoked the suffering of non-parties. Instead, he used the fact that this accident was one in a long line to show the conscious, willful nature of Ford's longstanding disregard of the proven risk posed by its conduct.

(3) Ford Invited Any Error.

Even if the arguments of counsel raised a substantial federal question, Ford could not complain about them, for they were addressed to a legal standard given the jury *in an instruction Ford proposed* (41 RT 8444-50, 8458, 8475-77):

> In determining the amount of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, *you may consider only Ford's wrongful conduct, if any, that has had an adverse impact on the citizens of California.* Accordingly, you may not award any punitive damages for the purpose of punishing Ford for the sale of vehicles in other states for any injuries that may have occurred in other states, or for the purpose of changing Ford's conduct in other states. (41 RT 8528 (emphasis added))

Under California law, when a court instructs a jury on the law, it frames the scope of permissible closing argument. *See Gotcher v. Metcalf*, 6 Cal. App. 3d 96, 100 (1970); *see, e.g., Neumann v. Bishop*, 59 Cal. App. 3d 451, 479-80 (1976); *cf.* CAL. CODE CIV. PROC. §607a (court must inform counsel before closing arguments of instructions it will give). Needless to say, a party cannot complain of an instruction that it proposed itself. *People v. Wader*, 5 Cal. 4th 610, 657-58 (1993). Counsel's arguments simply pointed out to the jury that many other Ford Explorers in California have the same defects as the Wilsons', and may also have "an adverse impact on the citizens of California." Even if such argument crossed a line drawn by *Philip Morris*, it was at Ford's invitation that Plaintiffs and the Court crossed that line.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

BENETTA BUELL-WILSON and BARRY S. WILSON,

Plaintiffs, Respondents, and Cross-Appellants,

v.

FORD MOTOR COMPANY and DREW FORD,

Defendants, Appellants, and Cross-Respondents.

On Appeal From The San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

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2. The punitive damages award is excessive under *State Farm* and California law

Even if liability for punitive damages were not otherwise precluded, the *$75,000,000* punitive judgment would have to be set aside in its entirety as grossly excessive as a matter of California law and the Due Process Clause of the Fourteenth Amendment. This punishment—which began as an outrageous ***$246,000,000*** punitive damages verdict—further confirms that the jury was motivated by anger, passion, prejudice, and bias. The award here is simply off the charts. It is more than three times larger than the largest punitive damages award ever upheld in California in an automotive products liability case in a published opinion. *See Romo*, 113 Cal.App.4th 738 ($23,723,287 award where accident involved three deaths and three other seriously injured individuals). As of 1997, the year of plaintiffs' vehicle, the largest automobile products liability punitive damages award upheld in a published California decision was $4,000,000, or roughly *1/19th* of the punitive damages here. *See Hasson*, 32 Cal.3d 388. A new trial is the only way to cure this defect in the proceedings. *See Sabella*, 70 Cal.2d at 316 n.2; *Wells*, 793 F.2d at 683-84.

If the compensatory damages award is upheld, then the punitive damages award must be set aside because of the large, clearly punitive noneconomic damages award. "[L]arge compensatory damage awards . . . have a strong deterrent and punitive effect in themselves." *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th at 424 (Brown, J., concurring); *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1106 (same). Heaping punishment on top of punishment by allowing the separate punitive damages award to stand would be excessive and unconstitutional.

Moreover, if the compensatory damages award is reduced, then the punitive award must likewise be reduced to maintain a proper ratio. As the Supreme Court stated in *State Farm*, where compensatory damages are large (and the Court deemed a $1 million compensatory award large), punitive damages should not exceed the compensatory award. *State Farm*, 538 U.S. at 424-28.

Either way, Ford is entitled to a new trial regarding punitive damages, or at the very least a substantial remittitur.

APPENDIX B

IN THE SUPREME COURT OF CALIFORNIA

BENETTA BUELL-WILSON et al.,

Plaintiffs and Respondents,

v.

FORD MOTOR COMPANY, et al.,

Defendants and Appellants.

After A Decision By The Court of Appeal,
Fourth Appellate District, Division 1,
Case Nos. D045154, D045579

San Diego County Superior Court
The Honorable Kevin A. Enright
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PETITION FOR REVIEW

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Appendix B

ISSUES PRESENTED FOR REVIEW

1. In a product liability design case, is evidence of industry standards and custom, including the product's real-world safety performance relative to comparable products, relevant to the issues of design defect and punitive damages?

2. In a product liability design case, can malice within the meaning of Civil Code section 3294 be deemed established by clear and convincing evidence against a motor vehicle manufacturer where (a) the vehicle complies with applicable federal standards that are required by law to "meet the need for motor vehicle safety," (b) the federal government has rejected the precise standards used by plaintiffs' expert to condemn the product as defective, (c) the vehicle is as safe or safer than comparable vehicles, and (d) there is an objectively reasonable, genuine debate over whether the product is defective?

3. In evaluating punitive damages pursuant to the federal due-process *de novo* review standard, may a court (a) apply the state-law substantial evidence test to presume that the jury made findings it did not expressly make and to disregard objective factors mitigating reprehensibility, and (b) punish the manufacturer's lawful conduct, including its sale of a product to third parties before the court, even where the manufacturer prevailed in the previous eleven cases involving that same product?

* * *

these important issues.[5]

At a minimum, this Court should grant and hold this case pending the Court's decision in *City of Hope v. Genentech*, S129463, which presents some of the same punitive damage liability issues. *See, e.g.*, Brief of the Product Liability Advisory Counsel, as *amicus curiae* therein.

III.

This Court Should Grant Review To Clarify The Standards For Scrutinizing Punitive Damages For Excessiveness Under The Due Process Clause In The Product Liability Context.

Even as reduced, the $55 million punitive damage award remains the largest single-accident personal injury punitive damage award ever affirmed on appeal in California history. The Court of Appeal's decision upholding this punishment contradicts *State Farm*, *supra*, 538 U.S. 408, and *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, and the decisions of this Court and other courts, and it will sow confusion and injustice unless this court grants review.

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5. Review is also needed because the Court of Appeal's interpretation of Section 3294 renders it unconstitutionally vague as applied in this case, both because Ford did not have notice sufficient to tailor its conduct to avoid punishment and because of the risk of arbitrary and discriminatory enforcement. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Connally v. General Constr. Co.*, 269 U.S. 385, 391-92 (1926); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915); *Hewitt v. State Bd. of Med. Exam'rs*, 148 Cal. 590, 592-93 (1906).

Appendix B

A. Misinterpretation Of The De Novo Review Standard.

The Court of Appeal incorrectly interpreted the "[e]xacting" de novo standard of review of punitive damages awards (*see, e.g.*, State Farm, supra, 538 U.S. at 418), which, as this Court has held, requires courts to, among other things, "mak[e] an independent assessment of the reprehensibility of the defendant's conduct" with deference only to the jury's "express" findings and without "presum[ing]" the jury made other findings not stated in the verdict. *Simon v. San Paolo U.S. Holdings Co., Inc.*, 35 Cal. 4th 1159, 1172-73 (2005). The need for searching review is compelling here since the court below found that the jury acted out of passion and prejudice, not fairness and neutrality, during the first phase of the trial and those improper motives may well have tainted the jury's original $246 million punitive verdict. *See State Farm, supra*, 538 U.S. at 417 [discussing danger of jury bias].

The jury made only one express factual finding specifically relating to punitive damages—that Ford acted with "oppression, fraud, or malice"—yet the Court of Appeal assumed that the jury agreed with plaintiff's every accusation, and refused to consider any Ford evidence—even uncontradicted evidence. Slip op., pp.9, 57, 58-61. The court, in conducting its due process review, simply cited back to and adopted the same extraordinarily deferential view of the evidence that it used when applying the state-law substantial evidence test to the jury's finding of malice. *See* n.1, *ante*.

Consequently, while the court purported to be applying de novo review, it deferred to unstated "findings of historical fact" that it presumed the jury had made (slip op., p.57),

wholly distorting its evaluation of the reprehensibility of Ford's conduct. For example, the court stated that the purported evidence of "high" reprehensibility was "primarily adduced through Ford's own internal memoranda and correspondence" (*id.*, pp.59, 61), but it disregarded what those documents actually say. *Compare*, *e.g.*, AA2518-2519 with slip op., p.12. The court referred to tests the Explorer failed (slip op., p.12), ignoring plaintiffs' concessions and the evidence that these tests involved prototype, not production, vehicles. *See*, *e.g.*, Respondent's Brief, p.43, fn.33. The court asserted that the "higher the [stability index] rating the more stable the vehicle" (slip op., p.10) ignoring plaintiffs' own expert testimony and NHTSA's conclusions that numerous other factors affect vehicle stability. RT3712:22-3721:28; AA605, 607 [52 Fed. Reg. 49033, 49035 (Dec. 29, 1987)]. The court asserted that "Ford knew before the Explorer was released for sale that the same instability characteristics [in the Explorer] led to serious injuries to Bronco 11 drivers" (slip op., p.46), ignoring documents written by Ford engineers before the Explorer was released showing their belief that "'[w]hile the Bronco 11 has FARS statistics in the 'middle-to-poor' range, the Explorer is expected to be 'near B-1-C'" [Best In Class]." AA2482; *see also*, *e.g.*, AA2518-2519. And the court relied on plaintiffs' expert testimony that occupants are injured in rollovers "only when the roof crushes" (slip op., p.14), ignoring the undisputed fact that a substantial body of scientific evidence strongly suggests that increasing roof strength does not reduce injuries. *See*, p.11, *ante*.

B. Misinterpretation Of The Reprehensibility Guidepost.

As a result of its misunderstanding of *de novo* review, the Court of Appeal failed to take into account the multiple objective factors—such as industry standards and custom, federal regulatory decisions, and the genuine debate on these complex design issues—discussed above in Sections I and II, ante. Even if these factors do not completely bar punitive damages, they are relevant to gauging the reprehensibility of Ford's conduct. *BMW*, *supra*, 517 U.S. at 565, 570-71, 577-78 [considering defendant's compliance with statutes in other states in evaluating reprehensibility]; *Clark v. Chrysler Corp.*, 436 F.3d 594, 602 (6th Cir. 2006) [cutting $3 million punitive award to approximately $470,000 in design defect wrongful death case where the evidence established at most "a good-faith dispute over whether B-pillar testing is necessary"].)

The Court of Appeal incorrectly found Ford's conduct "more reprehensible" because it was "repeated and not an isolated incident" (slip op., p.60), based on the fact that Ford mass-marketed the Explorer as well as the Bronco II. This ruling contradicts *State Farm*, as well as *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191 (2005), because the court punished Ford for conduct toward third parties not before the court and their "hypothetical claims," "without ever proving the specifics of those 'hypothetical claims.'" *Id.* at 1210 (quoting *State Farm*, *supra*, 538 U.S. at 423).

As the record reflects but the Court of Appeal did not mention, Ford won the eleven prior trials alleging defects in the Explorer. AA11541237. By simply assuming that every sale of the Explorer is an example of "repeated" misconduct the court effectively nullified those eleven prior victories

(and others since), and inflicted punishment based on conduct exonerated by other juries.[6] The court has also subjected Ford to the threat of duplicative punishment in future cases that rely on the same supposed "repeated" conduct to impose additional punitive damages for marketing the Explorer. *See Johnson*, 35 Cal. 4th at 1209-10; *see also Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004).

If reprehensibility is properly evaluated, the necessary conclusion is that Ford's conduct was not remotely reprehensible. The proper evaluation of alleged reprehensibility is a recurring and important issue in product liability cases that deserves this Court's attention. At a minimum, this Court should grant and hold this case pending the Supreme Court's decision in *Philip Morris USA v. Williams*, 127 P.3d 1165 (Or. 2005) (upholding $79 million punitive award), *cert. granted May 30, 2006*, No. 05-1256, __ U.S.__ [126 S. Ct. 2329]; *cf. Bullock v. Philip Morris USA, Inc.*, S143850.

CONCLUSION

The petition should be granted.

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6. Since the verdict here, Ford has prevailed in the majority of Explorer trials.

(8)

No. 06-1068

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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON AND BARRY S. WILSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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This Supplemental Brief responds to three briefs of *amici curiae*: the Chamber of Commerce of the United States ("the Chamber"), the Product Liability Advisory Council, Inc. ("PLAC") and the Alliance of Automobile Manufacturers/National Association of Manufacturers ("the AAM").

Amici purport to address Question 1 (whether the punitive damages award deprived Ford of "fair notice" due to the alleged vagueness of California law) and Question 2 (whether the California courts misapplied the "reprehensibility" analysis), and do not address Question 3, or the proposed remand in light of *Philip Morris* advocated in Petitioner's Supplemental Brief. But what *amici* actually do is advocate substantive Due Process limitations—ones *not* advocated in Ford's Petition—*prohibiting* punitive damages in a product liability case if the defendant (1) has complied with federal regulatory standards, and/or (2) can establish a dispute among experts about the design decisions in question. As we first show, Ford's Petition does not properly present those issues. And in any event, *amici* demonstrate no reason why certiorari should be granted.

I.

THE ISSUES *AMICI* RAISE ARE NOT PROPERLY PRESENTED.

A. The Petition Does Not Assert, And Ford Did Not Claim Below, That The Constitution Bars Punitive Damages If A Defendant Complied With Federal Regulatory Standards, And/Or If Experts Disagree About A Product's Safety.

The Chamber asserts that, as a matter of federal Due Process, punitive damages may not be imposed "[w]here . . . a defendant's challenged conduct complies with relevant government and industry safety standards." Chamber Br. 5; *see also id.* at 4 ("States may [not] *punish* motor vehicle manufacturers notwithstanding compliance with federal motor vehicle safety standards" (emphasis in original)).

Likewise, the AAM argues that, because Ford allegedly "had ample basis (including the support of . . . the federal government) for concluding that its designs were reasonable," it "cannot constitutionally be punished here." AAM Br. 12.

The AAM also contends that the Explorer's design features "were the subject of genuine debates in the engineering community about how to best balance performance and safety," and that because "reasonable people could differ concerning whether the benefits of the designs outweighed their risks," punitive damages are precluded. *Id.* Similarly, PLAC argues that punitive damages are barred "when there is a genuine dispute among experts at the time that design decisions are being made." PLAC Br. 10 n.4.

Ford made *state law-based* arguments to this effect in the California courts. But it did not preserve a claim that the federal Constitution itself prohibited punitive damages if the relevant design decisions complied with federal regulations or were the subject of disagreements among experts. *See* Brief in Opposition ("Br. Opp.") 6. Nor does Ford's Petition make such arguments. To the extent *amici* advocate a substantive federal Due Process prohibition against punitive damages where a product complies with federal regulations or experts disagree about its design, those issues were not properly preserved and are not presented by Ford's Petition.

B. Ford Did Not Preserve The Repackaging Of Those Arguments As A "Fair Notice"/ Vagueness Issue.

The *amici* also present their "regulatory compliance" and "expert disagreement" arguments as problems of "fair notice" and vagueness under the Due Process Clause. Unlike the substantive Due Process arguments discussed above, this contention *does* appear in Ford's Petition. However, the argument was not properly preserved, for Ford did not include it as an Issue Presented in its Petition for Review to the California Supreme Court. Br. Opp. 4-6. Accordingly, it is not before this Court.

C. The Petition Repackages The "Regulatory Compliance" And "Expert Disagreement" Arguments In Terms Of "Reprehensibility," But That Issue Was Not Preserved Either.

In addition, *amici* contend that, as a matter of federal constitutional law, "compliance with regulations" and "disagreements among experts" are defenses to a contention that a defendant's conduct was "reprehensible." Once again, however, Ford did not present that argument to the California Court of Appeal as an issue of federal constitutional law. Instead, Ford raised it only as an issue of state law. Br. Opp. 6. As with the other issues discussed by *amici*, this contention is not properly before the Court.

II.

THE "FAIR NOTICE"/VAGUENESS ARGUMENT PRESENTS NO ISSUE MERITING CERTIORARI.

Like Ford, *amici* attempt to shoehorn their contentions that compliance with federal regulations and/or the existence of a dispute among engineers about the adequacy of a manufacturer's design decisions altogether bars a punitive damages award into a federal Due Process "fair notice"/vagueness argument. Thus, *amici's* briefs repeat arguments, founded on state law, that they made to the California Court of Appeal, and cite *some* decisions—again, decisions based on state law—that support them. But, like Ford, *amici* cite no case holding that the federal Due Process Clause requires a state to make compliance with regulations or a dispute among experts an absolute defense to a punitive damages claim. *See* Br. Opp. 13.[1]

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[1]For example, the Chamber's brief (at 3,7) cites the following cases, all of which apply state law, rather than federal constitutional law: *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (Mississippi law); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048,

(continued . . .)

In fact, California law is not vague on this issue: in California, as in most states, neither a disagreement among experts nor compliance with federal regulations is an absolute bar to punitive damages. *See* Br. Opp. 11. On the other hand, those are *relevant* factors, and nothing in the Court of Appeal's decision precludes a defendant from presenting evidence that it complied with regulations or that there was a dispute among engineers or other experts over safety issues relating to the product's design.[2] *Id.* Indeed, Ford *did*

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1058 & n.20 (11th Cir. 1994) (Alabama law); *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) (Missouri law); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 855-56 (10th Cir. 1986) (Colorado law); *Brand v. Mazda Motor Corp.*, 978 F. Supp. 1382, 1394-95 (D. Kan. 1997) (Kansas law); *Welch v. Gen. Motors Corp.*, 949 F. Supp. 843, 844-46 (N.D. Ga. 1996) (Georgia law); *Boyette v. L.W. Looney & Son, Inc.*, 932 F. Supp. 1344, 1347-48 (D. Utah 1996) (Utah law); *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699, 703 n.8 (D. Md. 1993) (Maryland law); *Miles v. Ford Motor Co.*, 922 S.W.2d 572, 589-90 & n.7 (Tex. App. 1996), *aff'd in part, rev'd in part on other grounds*, 967 S.W.2d 377 (Tex. 1998) (Texas law); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (Georgia law); *American Cyanamid Co. v. Roy*, 498 So. 2d 859, 862-63 (Fla. 1986) (Florida law); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 826 (Fla. 1986) (Florida law). The same is true for all the cases cited in PLAC's brief at 9 n.3: *Satcher*, 52 F.3d at 1317 (discussed above); *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) (Iowa law); *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 618 (Iowa 2000) (Iowa law); *Owens-Corning Fiberglas Corp. v. Garrett*, 682 A.2d 1143, 1161-68 (Md. 1996) (Maryland law); *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 99-100 (Iowa 1994) (Iowa law); *Loitz v. Remington Arms Co.*, 563 N.E.2d 397, 407 (Ill. 1990) (Illinois law). Finally, the AAM's brief just cites some of the cases cited in the other *amici* briefs. *See* AAM Br. 13.

[2] *Amici's* statements that the Court of Appeal held "that compliance with federal safety standards is *irrelevant* to determining whether punitive damages are warranted" (Chamber Br. 2 (emphasis added); *see also id.* at 4), "rejected reliance on contemporaneous expert opinion as a factor to be considered" (PLAC Br. 10), and "deemed those factors [com-

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present evidence (which Plaintiffs disputed) that the Explorer complied with the one applicable federal regulatory standard. *Id.* There is therefore nothing about California punitive damages law that *amici*—or the hypothetical automobile maker of common intelligence—cannot understand.

In fact, California's punitive damages statute is far more detailed and specific than the statutes upheld against vagueness challenges in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 465-66 (1993), and in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 19-20, 24 n.12 (1991). *See* Br. Opp. 13-14. Yet none of the *amici* even mention those holdings[3] or the more particularized nature of the California statute.

Any automobile manufacturer familiar with California law would know that it might be liable for compensatory and punitive damages if it manufactures a vehicle that (1) rolls

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pliance with regulations and genuine debate in the engineering community about the design tradeoffs] completely irrelevant" (AAM Br. 9) are false and distort the opinion below.

The AAM also quotes the opinion's statement that "'compliance with industry standards or custom [i]s *irrelevant* . . . to punitive damages.'" *Id.* at 11 (emphasis added to opinion by AAM). However, the Petition presents no issue of whether the Constitution requires states to allow, as a defense to punitive damages, evidence that "everybody else does it too." Nor did Ford make any such argument below. *See* Br. Opp. 7. Instead, Ford argued that the trial court erred, as a matter of state law, in refusing to allow it to present statistical evidence that some vehicles made by other companies had comparable rollover rates. *See* Br. Opp. 7-8. Moreover, because the Court of Appeal held that this evidence was not only irrelevant, but also inadmissible under state law as "unreliable and misleading" (Pet. App. 23a), the evidence's exclusion rests upon an adequate and independent state ground. *See* Br. Opp. 8.

[3]PLAC's discussion of the vagueness issue does cite Justice O'Connor's dissent in *Haslip* (PLAC Br. 6), without even mentioning the majority's rejection of the vagueness argument.

over in normal, foreseeable conditions, if the driver swerves to avoid an obstacle; (2) has a roof that is so weak that it will collapse during a rollover; (3) could have been made more stable and given a stronger roof through well-known, available and cost-effective design changes, if the manufacturer knows of these defects, and reasonable solutions, but—over an extended period of time—repeatedly chooses not to make the vehicle safe from rollover for profit-maximization reasons. Accordingly, the decision below presents no issue of Due Process or fair notice.[4]

III.

THE OPINION'S ANALYSIS OF "REPREHENSIBILITY" PRESENTS NO ISSUE MERITING CERTIORARI.

Like Ford, *amici* attempt to recycle state law arguments they presented in the California courts that the Due Process Clause compels the conclusion that compliance with federal regulations, and/or the existence of a disagreement among engineers, *conclusively* establishes that the defendant's conduct was not "reprehensible." We emphasize the word "conclusively" because, as already shown, California law permits a defendant to present evidence as to these factors, and to argue that they negate or at least reduce the degree of reprehensibility. *See* p. 4-5, *supra*; Br. Opp. 15. Indeed, both the trial judge and the Court of Appeal considered Ford's arguments about diminished reprehensibility,

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[4]Given this record and the findings of the California courts, it is wholly incorrect to characterize this case as one where punitive damages were imposed simply because "Ford knowingly (*i.e.*, intentionally) mass produced a product that entailed some risk of harm." PLAC Br. 14. As the Brief in Opposition explains, the Court found Ford's misconduct "repeated" not because it mass-manufactured the Explorer, but because it repeatedly made design choices that sacrificed safety for profits and production schedules. *See* Br. Opp. 9-10 & n.6; *id.* at 23.

and each substantially reduced the punitive damages award. *Id.*

But as the Court of Appeal's opinion explained (Pet. App. 46a-50a), and the Brief in Opposition demonstrates, there were good reasons why those arguments did not completely eliminate the punitive damages award. *First*, there are no federal standards for stability. Br. Opp. 15. *Second*, there are no federal standards for roof-strength warnings, another ground for liability. *Id. Third*, there was a serious factual dispute as to whether Ford complied with the one applicable federal regulation at issue, relating to roof structure (*id.* at 15 n.10)—a dispute that the Court must assume was resolved by the jury in Respondents' favor. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996). *Fourth*, Congress expressly made federal automobile design regulations non-preemptive, reflecting its judgment that the regulations should not preclude states from imposing stricter standards, and this non-preemption encompasses not only the imposition of liability for compensatory damages, but all common law remedies, including punitive damages. Br. Opp. 15-16. *Fifth*, there was *no* evidence of an internal debate or disagreement among Ford engineers as to the Explorer's design features, or that Ford's management relied on the advice of outside safety experts in rejecting internal engineering proposals that would have made the Explorer safer. *Id.* at 16.

Because they largely ignore these facts, *amici's* briefs are curiously disconnected from the actual facts of *this* case. For example, PLAC argues that a manufacturer "that cho[se] between experts with competing opinions on a particular safety feature" has not acted reprehensibly. PLAC Br. 16. Likewise, it says that a manufacturer who "'think[s] about risk in a systematic manner" and "undertake[s cost-benefit] calculations to ensure that there is appropriate risk balancing'" has not acted reprehensibly. *Id.* at 17 (citation omitted). But although *PLAC* says that any "manufacturer

inevitably confronts disagreement among experts about the benefits and relative costs of proposed safety features" (*id.* at 8), *Ford* presented no evidence that its decisionmakers made a choice "between experts," thought about risk "in a systematic manner" or undertook "cost-benefit calculations" in a good-faith effort to engage in "appropriate risk balancing."[5] See Br. Opp. 16. What limitations, if any, the Constitution places on punitive damage awards where such showings *are* made can be explored in a case that actually raises those issues.

IV.

NO GUIDANCE IS NECESSARY ON THE PROPER APPLICATION OF *STATE FARM* TO PRODUCTS LIABILITY CASES.

In the final section of its brief, PLAC contends that certiorari should be granted because application of the punitive damages guidelines set forth in *State Farm* has resulted in "eye-popping exactions regularly being upheld in product-liability cases." PLAC Br. 12. PLAC contends that these awards are the result of "systematic bias" due to the fact that "three of the five reprehensibility factors identified in *State Farm* are treated as present automatically in all product-liability cases in which punitive damages are imposed." *Id.*[6]

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[5]Similarly, the AAM asserts that "Ford demonstrated that its designs . . . were the subject of genuine debates in the engineering community about how to best balance performance and safety" (AAM Br. 12) but cites no evidence (and there is none) that when Ford's decisionmakers rejected its engineers' proposals to fix the Explorer's rollover problem and strengthen its roof structure, they did so based on an actual assessment of those "genuine debates."

[6]PLAC also contends that such awards duplicate compensatory awards "that often include[] a large punitive element in the form of increasingly large non-economic damages." PLAC Br. 4. But it ignores

(continued . . .)

If these assertions were true, PLAC would have provided the Court with examples of gargantuan punitive damages awards upheld by appellate courts that gave only lip service to the reprehensibility analysis required by *State Farm*. Yet this portion of PLAC's brief does not cite a *single* case that supposedly exemplifies the need for the Court's guidance.[7] Aside from this case, the only decisions PLAC cites in its entire discussion of this issue are a concurring opinion in one case and three decisions on a collateral point mentioned only in a footnote: an unpublished decision of the Hawaii Court of Appeals, an unpublished District Court decision from Nevada and a California Court of Appeal decision. *See* PLAC Br. 12 n.5. This hodgepodge of decisions does not show a problem in the case law that warrants the Court's attention.[8]

Nor do products liability cases following *State Farm* demonstrate that outsized punitive damage awards go unreviewed by appellate courts. To the contrary, many post-*State Farm* product liability decisions involve very substantial

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the fact that the Court of Appeal in this case greatly reduced the non-economic damages upheld by the trial court in order to ensure that, as the opinion specified, "no punitive element remains." Pet. App. 41a.

[7]Similarly, PLAC cites no case to support its assertions that "breathtaking punitive awards are regularly imposed for products that satisfy extensive and detailed government regulations" (PLAC Br. 8 n.2) or that "the lower courts have consistently misapplied the ratio and comparative-penalties guideposts in product cases." *Id.* at 11.

[8]Moreover, what PLAC does say about punitive damages cases in other portions of its brief is incomplete and misleading. For example, PLAC describes a "$1 million penalty in the case of a fishbowl that shattered while being carried." PLAC Br. 4. PLAC neglects to state that this award was reduced to $403,416 on appeal. *See Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 577 (Or. Ct. App. 2003).

reductions in jury verdicts.[9] Other decisions affirm punitive damage awards, but only where the ratio to compensatory damages is not unduly high and the reprehensibility of the defendant's specific conduct warranted significant punishment.[10] In short, nothing about the lower courts' application of the *State Farm* guidelines in product liability cases warrants intervention by the Court.

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[9] *See, e.g., Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006) (84.3% reduction); *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (Cal. Ct. App. 2003) (over 90% reduction); *Waddill*, 78 P.3d at 574 (60% reduction); *Bocci v. Key Pharm., Inc.*, 76 P.3d 669 (Or. Ct. App.) (84.5% reduction), *modified on other grounds*, 79 P.3d 908 (Or. Ct. App. 2003).

[10] *See, e.g., Groth v. Hyundai Precision & Ind. Co.*, 149 P.3d 333, 337, 340 (Or. Ct. App. 2006) (upholding punitive damages award of 3.4 times compensatory damages where product did not meet industry guidelines and defendant "knew about the risk to the lives of workers and consciously—and deceptively—ignored that risk"); *Staskal v. Symons Corp.*, 706 N.W.2d 311, 314, 333 (Wis. Ct. App. 2005) (upholding punitive damages award of less than twice compensatory damages where defendant's conduct was "egregious"); *Sufix, U.S.A., Inc. v. Cook*, 128 S.W.3d 838, 843 (Ky. Ct. App. 2004) (upholding award approximately equal to compensatory damages where "manufacturer . . . cavalierly subject[ed] the public to an unreasonable risk of catastrophic injury").

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No. 06-1068

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

SUPPLEMENTAL BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of *certiorari* remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner Ford Motor Company ("Ford") respectfully submits this supplemental brief to address the implications of this Court's decision in *Philip Morris USA* v. *Williams*, No. 05-1256 (Feb. 20, 2007), handed down after Ford filed its Petition. *See* Rule 15.8. *Philip Morris* makes even clearer the need for this Court's plenary review of the first two questions presented in Ford's Petition, and confirms that, at a minimum, this Court should grant *certiorari*, vacate the judgment, and remand the case to the California courts for reconsideration in light of this new ruling. Indeed, this case presents an even more graphic example of improper punishment for alleged third party harm than *Philip Morris*.

DISCUSSION

I. *Philip Morris* Reinforces The Need To Clarify Application Of The Due Process "Fair Notice" Principle To The Standards Governing Punitive Damage Liability

The Petition's first question presented focuses on the lack of adequate procedures and standards governing the imposition of liability for (as opposed to the amount of) punitive damages in product liability cases. Pet. at 9-22. *Philip Morris*, which focused on "the Constitution's procedural limitations," slip op. at 5, bears directly on this question.

In vacating the punitive damage award in *Philip Morris*, the Court observed, among other things, that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice * * * of the severity of the penalty that a State may impose,'" and "it may threaten arbitrary punishments, *i.e.*, punishments that reflect not an application of law but a decisionmaker's caprice." *Id.* at 4 (internal quotation marks omitted). Moreover, the Court recognized that such a standardless regime "may impose one State's (or one

jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies." *Id.* at 5 (citation omitted). Accordingly, the Court made clear that, "given the risks of arbitrariness," the "concern for adequate notice," and other dangers posed by punitive damages, "it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance." *Id.* at 7.

While *Philip Morris* addressed the standards for determining the *amount* of punishment, the concerns the Court underscores—such as fair notice, arbitrary punishments, and conflicting standards—apply with stronger force to the imposition of *liability* for punitive damages. Due process requires that a person be afforded "fair notice . . . of the *conduct* that will subject him to punishment." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996) (emphasis added). Here, California has failed to establish standards that provide such notice, instead permitting juries and reviewing courts to ignore all objective referents by which a defendant manufacturer in a product liability case can meaningfully gauge its conduct in advance. *See* Pet. at 9-22. As applied to complex product liability cases such as those involving automotive vehicles, California law "add[s] a near-standardless dimension to the punitive damages equation," *Philip Morris,* slip op. at 6, virtually guaranteeing that "[t]he jury will be left to speculate," "threaten[ing] arbitrary punishments," *id.* at 4, and defeating the policy choices of other States and the federal government. *Id.* at 7; *see* Pet. at 13-14.

In short, *Philip Morris* focused on precisely the "fundamental due process concerns . . .—risks of arbitrariness, uncertainty and lack of notice," *id.* at 6—that are at issue in here in a different context that raises even more serious due process difficulties. This Court has never directly addressed the due process constraints on the imposition of punitive damage liability in the first instance. Explication of the fundamental principle that juries cannot be cut loose from objec-

tive moorings when deciding whether to punish any more than when deciding the amount of punishment would greatly advance the jurisprudence that is applied to thousands of civil trials every year. Enforcing this basic procedural due process principle would reduce the number of arbitrary verdicts requiring excessiveness review. The Court should therefore grant plenary review and address this issue in this case.

II. *Philip Morris* Leaves Open The Important And Recurring Excessiveness Issues That Are Especially Acute In Personal Injury Cases

Ford's second question presented is plainly certworthy, as it raises a variant of the excessiveness question upon which the Court granted review—but did not reach—in *Philip Morris*. Prior to *Philip Morris*, all of the Court's punitive damage cases arose in the context of financial torts. Product liability and personal injury cases, however, present unique and troubling issues regarding application of the due process excessiveness guideposts that have divided the lower courts. *See* Pet. at 22-28. In view of its disposition of the first issue presented in *Philip Morris*, the Court declined to reach the issue "whether the [punitive damage] award is constitutionally 'grossly excessive.'" Slip op. at 10. Consequently, the lower courts still lack guidance regarding the due process guideposts' meaning in personal injury cases.

This case provides an even better opportunity than *Philip Morris* for the Court to provide such guidance. The precise excessiveness issue framed by *Philip Morris* concerned application of the ratio due process guidepost, *Philip Morris*, slip op. at 4, but *Philip Morris* was a high ratio case like all the Court's previous punitive damage decisions. Here, in contrast, the ratio is 2-to-1, but the compensatory award—$122.6 million as awarded by the jury and $27.6 million after the California courts' remittiturs, Pet. App. 2a-3a, 61a—is far more substantial than in *Philip Morris* or any other prior case considered by the Court, and consists mostly of non-

economic damages that themselves likely contain a punitive component. Moreover, this Petition raises the issue of how the reprehensibility guidepost applies in personal injury cases, and thus would allow the Court to address in one case the interaction of the due process guideposts in the physical injury context. Thus, *Philip Morris* confirms that the second question presented warrants plenary review.

III. At A Minimum, The Court Should Grant, Vacate, And Remand This Case

The Court in *Philip Morris* squarely held that due process does not "permit[] a jury to base [a punitive damage] award *in part* upon its desire to *punish* the defendant for harming persons who are not before the court," slip op. at 1 (first emphasis added), and that, where circumstances present a risk that the jury may be confused by the purpose for which evidence of other incidents is introduced, "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring," *id.* at 9. At a minimum, this requires vacatur of the judgment below.

At trial of this case involving a particular accident in a Ford Explorer, plaintiffs introduced mountains of evidence regarding other Ford vehicles and alleged injuries, and directly asked the jury to impose punitive damage liability against Ford based on those other vehicles and injuries. The California courts clearly failed to invoke procedures to protect against punishment for third party harm, even though Ford at every turn asked them to do so—by seeking to exclude evidence and argument, asking for a relevant jury instruction, arguing on appeal that this violated due process, and asking the courts to reject unconstitutional consideration of third party harm in their due process excessiveness review.

1. Although this case involved a 1997 Ford Explorer, plaintiffs, from start to finish, devoted much of their case to urging the jury to punish Ford for allegedly killing or injur-

ing third parties not before the court who were driving a different vehicle—the Bronco II. Indeed, in opening statement, plaintiffs' counsel characterized the safety record of the Bronco II—which never injured plaintiffs—as "*issue No. 1, we are going to be dealing with in this case.*" RT 669:11-17 (emphasis added). He added that "the Bronco II has been singled out for criticism" for its "death record." *Id.*

Plaintiffs devoted *days* of testimony to the Bronco II and its supposed failings and then, in closing argument, drove home for the jury their claim that Bronco II injuries themselves warranted imposing punitive damages here:

- "They go ahead and release the Bronco II in 1983 . . . knowing it will roll over and kill or catastrophically injure many people, which it has. Fraud, oppression, malice, these are issues that relate to one question that has clear and convincing [*sic*]. T[his is t]he last question on the verdict form, [and] it is the most importan[t answer] you will give in this case." RT 8172:17-25.

- "Ron Campbell testifies that Ford is aware by 1989 that many people are killed or seriously injured in [Bronco II] rollovers. Right in this time period, and they are going out to market with this new launch with Job 1 with the engineers telling them the same problems. Conscious, deliberate, oppressive, fraudulent conduct." RT 8173:26-8174:3.

See also RT 8172:27-8173:6 (suggesting Ford should be punished here for Bronco II documents allegedly missing for more than 20 years). There was no basis for the jury to think that these arguments were aimed at proving the "reprehensibility" of Ford's conduct in designing the Explorer, as distinguished from punishing Ford directly for harm caused by the Bronco II. *Compare Philip Morris*, slip op. at 7-8. Rather, "the sort of evidence that was introduced at trial [and] the kinds of argument the plaintiff made to the jury," *id.* at 10,

created an "unreasonable and unnecessary risk" that the jury would use its verdict to punish Ford directly for alleged injuries to third parties caused by the Bronco II. *Id.* at 9.[1]

2. Plaintiffs also repeatedly invoked before the jury the alleged accidents and injuries of other Explorer drivers, even though Ford had won the prior eleven cases involving these defect claims, and there was no actual evidence of other injuries, their proximate causes, severity, or how this alleged threat to other drivers compared to that of other SUVs. *Compare Philip Morris*, slip op. at 6 ("[T]o permit punishment for injuring a nonparty victim would add a near-standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate.").[2]

In *Philip Morris*, "the plaintiff's attorney had told the jury to 'think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . . In

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[1] The Court in *Philip Morris* emphasized that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" Slip op. at 5 (quoting *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972)). But here not only did the California courts allow plaintiffs to seek punishment based on the fatal rollover rate of the Bronco II—a vehicle not involved in this case—but they barred Ford from introducing evidence that the *Explorer's* own actual rollover rate was much better than the Bronco II's and in fact was "one of the best rollover rates compared to other SUV's in its class." Pet. App. 20a. Consequently, Ford, "threatened with punishment for injuring a nonparty victim[,] ha[d] no opportunity to defend against the charge." *Philip Morris*, slip op. at 6.

[2] Imposing massive punitive damages for a supposed defect after eleven previous juries found no liability at all also risks another due process violation that *Philip Morris* highlights, namely, "the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies . . . upon other States," thereby increasing "the risks of arbitrariness [and] the concern for adequate notice." *Philip Morris*, slip op. at 7.

Oregon, how many people do we see outside, driving home . . . smoking cigarettes?'" Slip op. at 2. In this case, plaintiffs' counsel made an even more extreme closing argument regarding other Explorer owners:

- "[T]housands of these vehicles were manufactured and sold in their defective condition and they are on our highways in California. And every time we look at one of those vehicles, we hope and pray there is no [accident] avoidance maneuver necessary." RT 8508:25-8509:1

- "Hundreds of Explorer rollover cases. [Ford expert] Tandy, involved at least in dozens of on-road untripped Explorer rollover cases. And I cross-examined [Ford expert] Germane, from other cases. . . . Cases that these guys are working on together. Ford management's willingness to accept this risk from the Bronco II through the [1997 model Explorer] is the definition precisely of fraud, malice and oppression." RT 8179:6-14.

- "That was callous, that was willful disregard. Did they do the test? No. The test drivers are out on the roads of California. Willful disregard of the health and safety of Benetta and those like her. Was this a single isolated incident? No. You have heard of others in California. Just a few we were allowed to present." RT 8508:15-21.

- "This is not only . . . a case involving one family here in California, but . . . they marketed to specifically, the soccer moms, the women with babies, the toddler seats, the families." RT 8510:17-20.

3. Ford repeatedly requested that the California courts recognize and apply "the Constitution's procedural limitations," *Philip Morris*, slip op. at 5, precluding punishment based on third party harm. Ford moved *in limine* to exclude the Bronco II evidence, but the trial court denied the motion,

RT 410:9-11, and granted Ford a continuing objection to evidence about the Bronco II. RT 629:5-630:24. Ford also moved the trial court in limine to protect Ford's constitutional due process rights by excluding all evidence or argument for punitive damages based on "conduct that [bears] no relation to the [plaintiffs'] harm," and to

> ensure that plaintiffs do not, in opening or closing statement or at any time during trial, urge punishment on any of these unconstitutional bases. For example, plaintiffs should not be permitted to urge the jury to vindicate the rights of other persons not before the court. . . . or to punish Ford for any conduct that goes beyond the specific alleged harm to the plaintiffs in this case.

Motion In Limine No. 31, at 8-9 (quoting *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 423 (2003)). The court denied Ford's motion in all material respects, excluding only Ford's financial data from the first phase of the bifurcated trial. RT 615:23-616:13.

Ford also proposed to instruct the jury that it could not punish Ford for harms to third parties, but the trial court rejected that instruction. *See* Pet. at 29, Pet. App. 103a (Ford's proposed instruction read: "In determining the appropriate amount of punitive damages . . . you may consider only the harm to the plaintiffs. . . . Therefore, if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiffs in this lawsuit."). Ford moved for a mistrial and an instruction to the jury to disregard plaintiffs' improper arguments on third party harm, but the court refused. *See* RT 8481:26-8482:5, 8497:17-8499:22; 8529:24-8531:8. And Ford asked for new trial, contending it had been unconstitutionally punished for alleged harms of third parties not before the court: "Plaintiffs' punitive damages case consisted principally of improper arguments by counsel, who repeatedly exhorted the

jury to punish Ford for the design of a vehicle that the Buell-Wilsons never owned and that did not cause their injuries. . . . *Counsel's closing argument never ceased invoking the alleged interests and injuries of non-parties*. . . ." Ford's New Trial Motion, at 18-19 (emphasis added).

On appeal, Ford squarely presented the constitutional issue posed by plaintiffs' invocation of third party harm, arguing that plaintiffs' counsel "encouraged the jury to impose punitive damages based on the Bronco II alone" and that

> [a]llowing this irrelevant and inflammatory evidence and argument, particularly to the extent it was allowed here, was highly prejudicial error requiring a new trial. Indeed, plaintiffs' invocation of the Bronco II as a basis for punitive damages, in and of itself, is unconstitutional and grounds for reversal, because *due process forbids imposing punitive damages against a defendant for conduct other than the specific conduct that harmed the plaintiffs before the court*. *State Farm*, 538 U.S. at 423.

Appellant's Opening Brief at 14-15 (footnotes omitted, emphasis added). Ford specifically argued that a then-recent California Supreme Court decision "confirm[ed] that a defendant may not be punished for conduct that did not harm the plaintiff." *Id.* at 15 n.4 (citing *Johnson* v. *Ford Motor Co.*, 35 Cal. 4th 1191, 1206 n.6 (2005)); *see also id.* at 10 (plaintiffs' "[c]ounsel exhorted the jury to 'send a direct message from society to Ford Motor Company,' . . . not only on behalf of the Wilsons, but to vindicate the interests of other consumers not before the court,'" and appealed to the jury to redress "what has happened to Benetta Wilson, and others like her.'") (citations omitted); Appellant's Reply Brief at 49 ("it is doubly improper to impose punitive damages here based on any alleged conduct in connection with the Bronco II, which never injured plaintiffs"); Petition For Review to the California Supreme Court, at 35-36 (court of ap-

peal's "ruling contradicts *State Farm* . . . because the court punished Ford for conduct toward third parties not before the court and their "hypothetical claims," "without ever proving the specifics of those 'hypothetical claims'") (citation omitted). But the court of appeal rejected all of Ford's constitutional arguments, and itself suggested that Ford could permissibly be punished for injuries resulting from sales of other supposedly defective vehicles, including other Explorers to non-parties, the Bronco II, and even the Pinto, Pet. App. 55a-57a, as respondents have acknowledged. *Id.* at 107a.

4. Here, therefore, as in *Philip Morris*, "the sort of evidence that was introduced at trial [and] the kinds of argument the plaintiff made to the jury," *Philip Morris*, slip op. at 10, created, "an unreasonable and unnecessary risk," *id.* at 9, that the jury acted out of a "desire to punish [Ford] for harming persons who are not before the court." *Id.* at 1. And as this Court concluded in *Philip Morris*, "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 7-8. But the California courts failed to provide such assurance, despite Ford's repeated requests, in plain violation of *Philip Morris*.

CONCLUSION

The Court should grant *certiorari* and set this case for plenary consideration, or, alternatively, grant, vacate, and remand this case for reconsideration in light of *Philip Morris*.

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REPLY BRIEF FOR PETITIONER

This case presents important, recurring questions regarding Due Process Clause restraints on punitive damages. Respondents have virtually nothing to say to refute the certworthiness of these issues, so they devote their opposition largely to misstating and distorting the record and the applicable court rules. But the record here could not be clearer: At every level, Ford advanced due process challenges to both liability for and the amount of punitive damages, and the court of appeal's decision contains detailed and express analysis rejecting Ford's arguments. These issues, therefore, are not only preserved, but ripe for this Court's resolution.

As Ford's Supplemental Brief shows, *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057 (2007), strongly supports Ford's arguments on all three questions presented and, at the least, requires vacatur and remand. Indeed, respondents' lengthy, belabored efforts to explain away *Philip Morris* confirm that there is easily "a reasonable probability that the decision below rests [on] premise[s] that the lower would reject if given the opportunity for further consideration" in light of *Philip Morris*. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

A. Question 1—Vague Standards Governing Punitive Damage Liability In Product Design Cases.

1. Respondents' waiver arguments are utterly baseless. Respondents concede that Ford expressly raised its as-applied vagueness challenge to California's punitive damage liability standards in the court of appeal, Opp. 5, and that court expressly decided it. Pet. App. 50a-51a. Respondents nonetheless assert that Ford "did not present it properly to the California Supreme Court in its Petition For Review" and "[t]he issue appears only in a footnote." Opp. 5. But this is manifestly false. Indeed, it was a principal theme of Ford's petition, which expressly raised it in the *very first paragraph*:

> Unless reviewed and overturned, that decision will render it irrelevant that a manufacturer's design decisions resulted in a product that complies with industry standards and custom, comports with relevant federal safety standards and reasonable policy judgments, and performs as well or better than comparable competing products. In place of these knowable standards, the decision substitutes a *vague regime* that will permit tens of millions of dollars of punishments to be imposed if a jury deems a manufacturer's conduct "despicable" on the strength of nothing more than a finding that, as will almost always be the case, the product might possibly have been made "safer" if more money had been spent in making it. That is neither constitutional nor rational. Review is necessary to conform California's product liability and punitive damage law to reason, common sense, and the United States Constitution.

Reply Appendix ("Reply App.") 3a (emphasis added).

Ford's petition expressly sought Supreme Court review in part because the appellate court's interpretation of California law was unconstitutional. Ford argued that the court below had "held that juries are authorized to deem a manufacturer's design decisions malicious, and impose severe punishment, even where undisputed, objective indicators . . . affirmatively refute malice as a matter of law. This ruling contradicts . . . due process. This issue is especially important because punitive damages 'pose an acute danger of arbitrary deprivation of property.'" Reply App. 5a (quoting *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417-18 (2003)). Further: "[T]he Court of Appeal's interpretation . . . renders it *unconstitutionally vague* as applied in this case, both because Ford did not have notice sufficient to tailor its conduct to avoid punishment and because of the risk of arbitrary and discriminatory enforcement." Reply App. 11a n.2 (emphasis added) (citing, *e.g.*, *City of Chicago* v.

Morales, 527 U.S. 41, 56 (1999)). Thus, Ford easily satisfied California's rules, which merely require that an issue be "fairly included" in those presented for review.[1]

2. Respondents' other claims are equally misguided. Respondents deny that the court of appeal held that objective referents, such as industry custom, were "irrelevant" to punitive damages, arguing that the decision allows juries to consider them. Opp. 10-11. The court, however, not only held that "compliance with industry . . . custom was irrelevant . . . to punitive damages," Pet. App. 23a, but also that "admission of such evidence is reversible error." *Id.* 22a. More fundamentally, respondents seem to miss entirely the point that the thrust of Ford's argument is that California law improperly permits juries to engage in standardless, subjective, and ad hoc policy judgments that ignore all objective factors that might otherwise give manufacturers "fair notice," contrary to *State Farm* and *Philip Morris*. *See* Pet. 11-18; Supp Br. 1-3; *see also* AAM/NAM Br. 10-18; PLAC Br. 5-10.[2]

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[1] The California Supreme Court has broad power to "decide any issues that are raised or fairly included in the petition," Cal.R.Ct. 8.516(b), and applies this prudential criterion liberally. *See People* v. *Snyder*, 22 Cal. 4th 304, 310-11 (2000) (though not raised below, question whether, in view of constitutional and statutory constraints, Legislature had power to enact statute as interpreted below was "fairly included" in issue whether lower court's interpretation was correct). It may even consider issues "neither raised nor fairly included in the petition." Cal.R.Ct. 8.516(b)(2). Respondents' reliance (Opp. 5) on cases like *Beck* v. *Washington*, 369 U.S. 541 (1962), is therefore wholly misplaced. *See id.* at 550-553 (issue precluded where "unbroken line of precedent" showed state supreme court "has *unfailingly refused* to consider constitutional attacks upon statutes not made in the trial court" and petitioner failed to adhere to categorical appellate court rule requiring that errors "be definitely pointed out in the 'assignments of error' in appellant's brief") (emphasis added).

[2] Respondents falsely claim Ford argued the relevance of objective standards only "*as a matter of California law*." Opp. 11 (original emphasis). Ford's opening brief had *an entire section* showing that "if California law would allow punishment on this record, then the law is unconstitutionally vague as applied." Reply App. 33a-38a.

Respondents argue that this case is not certworthy because Ford is making an "as applied," rather than a facial challenge. Opp. 11. But these egregious problems recur regularly in product liability design cases and "there is no other context in which it is more important to ensure that punitive damages are not applied arbitrarily." PLAC Br. 3; *see also* Chamber Br. 9 ("the American business community has an acute interest in preventing the arbitrary imposition of punitive damages based on conduct that complies with reasonable objective guideposts for appropriate behavior").

Respondents also contend that, because Ford does not challenge the jury's award of compensatory liability, Ford "has no standing" to show how California's test for design defect interacts with its punitive damage statute. Opp. 12. But this makes no sense. Ford clearly has standing to challenge the application of such an amorphous and subjective defect "standard" as a predicate for a $55 million *punitive damage* award in the absence of other objective standards that would allow Ford to avoid punishment. *See* Pet. 11-15.

Although respondents claim that there is no vagueness problem here because Ford "knew" it *could* have made the Explorer safer if it had spent more money, Opp. 12-13, that is the very crux of the vagueness problem: "The unavoidable reality is that manufacturers are *always* aware that . . . their products could have been made even safer," and thus "in every products liability case[] a plaintiff will be able to offer 'proof'" of this. AAM/NAM Br. 18 (original emphasis). If this is all that is required for punitive damages, then "the law effectively provides no guidance on how a manufacturer can avoid such liability." PLAC Br. 8; *see also* Chamber Br. 4-6.

Finally, ignoring the many vagueness decisions cited by Ford, Pet. 10-11, 15-18, respondents assert that *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), and the plurality opinion in *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993), are "the relevant vagueness cases." Opp. 13.

But while *TXO* fleetingly referred to a vagueness issue, 509 U.S. at 465-466, both it and *Haslip* addressed only the due process challenges to the *amount* of punitive damages. *See id.* at 463, 465-466; *Haslip*, 499 U.S. at 24 n.12.[3]

B. Question 2—The Special Due Process Excessiveness Issues Posed By Product Design Cases.

1. Respondents also make the specious claim that Ford waived the due process excessiveness issue. Opp. 6-8. But Ford, having argued for pages that the Due Process Clause and California law prohibited the imposition of *any* punitive damages because its conduct was objectively reasonable, then declared that "[e]ven if liability for punitive damages were not otherwise precluded, the ***$75,000,000*** punitive judgment would have to be set aside in its entirety as grossly excessive [under] . . . the Due Process Clause." Reply App. 39a (original emphasis). When respondents argued in response that Ford's conduct was highly reprehensible, Ford replied: "[A]s discussed in detail above, Ford's good faith belief that its conduct was lawful was based on, among other things, its compliance with federal safety standards and industry custom, and significantly lessens any reprehensibility. *See BMW of N. Am., Inc.* v. *Gore* (1996) 517 U.S. 559, 565, 570-71, 577-78 (defendant's reliance on other state statutes authorizing the conduct at issue was reasonable and substantially mitigated reprehensibility)." Reply App. 45a. And the court of appeal analyzed the *State Farm/Gore* reprehensibil-

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[3] In fact, *Haslip* supports Ford by contrasting the more lenient due process review applicable to the *size* of a penalty with the more searching scrutiny used to address the imposition of liability in the first instance. *Id.* And to the extent California's statute on its face *appears* to provide a stringent punitive damage standard, Opp. 14, the stark disjunction between the facial and as-applied standards *increases* the due process problem. *See Bouie* v. *City of Columbia*, 378 U.S. 347, 353 (1964) (a "potentially greater deprivation of the right to fair notice . . . where . . . a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation").

ity guidepost in detail without giving any weight to the objective factors that Ford argued mitigated reprehensibility. Pet. App. 54a-57a.[4] This easily satisfies this Court's "pressed or passed upon" standard. *See, e.g., Kentucky* v. *Stincer*, 482 U.S. 730, 745 n.18, 747 n.22 (1987).[5]

2. Respondents' excursion into the "merits," Opp. 15-16, is misguided. They cannot dispute that this Court found the issue of how the excessiveness guideposts apply in the personal injury case to be certworthy—but did not resolve it—in *Philip Morris*. This issue has confused lower courts, which "treat[] all product-liability cases as if they fall on the high end of the reprehensibility spectrum merely because they involve physical harm, the design decisions at issue are 'intentional' rather than 'accidental,' and the jury necessarily found reckless disregard for safety as part of its threshold decision to impose punitive liability." PLAC Br. 11-12.

Similarly unavailing are respondents' strenuous attempts to distinguish *Clark* v. *Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006), and *In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006). Opp. 16-18. These cases contrast starkly with the court of appeal's dismissive treatment of the objective factors. Pet. 23-27. Despite the severe injuries in *Clark* (death), the Sixth Circuit found the existence of a reasonable disagreement to

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[4] Respondents assert that Ford's discussion of the excessiveness issue in its petition for review to the state-supreme court "never mentions the exclusion" of "industry custom," Opp. 7, but this also is false. Ford expressly argued that "the Court of Appeal failed to take into account the multiple objective factors – such as industry standards and custom . . .. Even if these factors do not completely bar punitive damages, they are relevant to gauging . . . reprehensibility. . . ."). Reply App. 12a.

[5] Respondents' complaints that Ford has expanded its arguments below are not only incorrect, but irrelevant. *Dewey* v. *Des Moines*, 173 U.S. 193, 197-198 (1899) (parties are entitled to "enlarge" upon arguments made below and "are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed"; *see also Stanley* v. *Illinois*, 405 U.S. 645, 658 & n.10 (1972).

be significant, militating against a finding of high reprehensibility. 436 F.3d at 603. And *In re Exxon Valdez* analyzed the "intent" factor very differently from the court here, which improperly conflated an intentional, lawful act (designing a motor vehicle) with an intent to cause injury. Pet. App. 57a.

C. Question 3—*Philip Morris* Requires, At A Minimum, Vacatur And Remand In This Case.

As Ford's Supplemental Brief shows, this case, from start to finish, was shot-through with improper invocations—over Ford's objections—of third-party harms as a basis for punishing Ford. Supp. Br. 4-8. In addition to arguing waiver yet again, respondents now sweepingly claim that "nothing in *Philip Morris* supports Ford's petition." Opp. 19. Both claims are, to put it bluntly, nonsense. Indeed, respondents' opposition, which labors for almost 15 pages to address *Philip Morris*, confirms that, at the very least, the California courts should address that decision's impact on this case in the first instance. *See Lawrence*, 516 U.S. at 167.

1. Ford amply preserved its argument that permitting reliance on injuries to third parties not before the court violates due process. Among other things, Ford moved *in limine* to exclude the Bronco II evidence implicating third-party harms, proposed relevant jury instructions, and moved to preclude respondents' improper arguments. *See* Supp. Br. 7-10. And, as respondents concede, Ford complained in the court of appeal "that Plaintiffs had asked the jury to punish it for Bronco II injuries suffered by non-parties." Opp. 8.[6]

Respondents argue that "Ford raised Bronco II-related jury arguments only in the part of its brief challenging the use of Bronco II evidence *as a matter of state law*." Opp. 8 (original emphasis). Respondents are plainly wrong. Ford

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[6] The record thus is much stronger than in *Philip Morris*, where "the sole objection . . . preserved was to the trial court's refusal to give defendant's requested charge." 127 S. Ct. at 1068 (Ginsburg, J., dissenting).

expressly argued that the Bronco II evidence and argument was improper "because due process forbids imposing punitive damages against a defendant for conduct other than the specific conduct that harmed the plaintiffs before the court." Reply App. 30a-31a (citing *State Farm*, 538 U.S. at 423). And Ford specifically cited a California Supreme Court decision interpreting *State Farm* on this point, and argued that Ford had impermissibly been *directly* punished for alleged third-party harms. *Id.* at 31a n.4 (citing *Johnson* v. *Ford Motor Co.*, 35 Cal. 4th 1191, 1206 n.6 (2005)); *see also id.* at 45a. In fact, Ford's introduction to this section "underscored . . . the serious due process implications of preventing a defendant facing unprecedented punishment from presenting relevant evidence in its defense . . . and allowing irrelevant and improper evidence to be used in support of such punishment." Reply App. 28a (citing, inter alia, *State Farm*, 538 U.S. at 423). This Court made precisely this point in *Philip Morris*. 127 S. Ct. at 1063; *see also* Supp. Br. 6 n.1.

Respondents belatedly contend that Ford failed to preserve this issue by not objecting to respondents' improper argument at trial. Opp. 8. But they did not make this argument below and the court of appeal rejected Ford's claims on the merits. Pet. App. 17a-20a. Respondents ignore Ford's motion in limine *specifically seeking to bar such arguments*, Supp. Br. 8, which preserved Ford's objections. *See People v. Wharton*, 53 Cal.3d 522, 549 n.3 (1991).[7]

Respondents assert that "the mass-marketing as repeated misconduct, or indeed the imposition of punishment based in any way on third-party injuries, is one of the few issues that Ford's 68-page Petition for Rehearing did *not* raise." Opp. 10 (original emphasis). This, too, is false. Ford's rehearing petition expressly argued that the decision below "flatly vio-

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[7] Respondents cite no authority for their meritless claim that Ford's proposal of alternative instructions on third party harm waives a challenge to improper evidence and argument. Opp. 8, 28-29.

lates *State Farm* . . . because the Court is punishing Ford for its conduct as to third parties not before the Court and 'hypothetical claims' of those third parties." Reply App. 20a; *see also id.* 21a-22a.[8] Thus, Ford's third-party harm arguments were pressed and passed upon below and properly preserved. *See Taylor* v. *Kentucky*, 436 U.S. 478, 483 & n.10 (1978).

2. The volume and intensity of respondents' efforts to avoid the implications of *Philip Morris* itself demonstrates that the Court should, at a minimum, grant, vacate, and remand this case. There is plainly a "reasonable probability" that the lower courts on remand would find that *Philip Morris* alters the result, *Lawrence*, 516 U.S. at 167.

Respondents urged the jury to punish Ford for alleged harms to third parties in a manner virtually identical to that which the Court rejected in *Philip Morris*. *See* Supp. Br. 6-7. Indeed, respondents expressly *concede* that the "block-quoted passage" in which they urged the jury to impose punitive damages "does refer to the Bronco II having killed or injured many people." Opp. 26. This is tantamount to an admission that they directly and improperly appealed to the jury to punish Ford for alleged harms to third parties. Although respondents now astonishingly assert that they never suggested that anyone else was actually *injured* by the design of the Bronco II or Explorer, Opp. 24-26, this strained and *post hoc* parsing of fragments of the record is, mildly put, unpersuasive. Even now respondents cannot stop themselves from trying to tar Ford with other cases involving different vehicles and third parties with unrelated injuries. Opp. 12.[9]

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[8] The third-party harm issue was expressly included within Issue 3 in Ford's Petition For Review in the California Supreme Court and addressed at numerous junctures. Reply App. 3a, 5a, 12a-13a.

[9] Respondents claim there was no actual *evidence* regarding third party harm, as opposed to improper, unsupported argument, Opp. 9, 24-25, but this is a *more* egregious due process violation, not less. *Philip Morris*, 127 S. Ct. at 1063 ("[T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages

Finally, respondents claim that "[w]hat most matters . . . is not passages in a trial transcript but the text of the published appellate opinion allegedly creating confusion or conflict in the law." Opp. 22. But *Philip Morris* makes clear that Ford was entitled to procedural protections—which it asked for but was denied—precluding punishment based on alleged third-party harms. Supp. Br. 1-3. The court of appeal rejected Ford's arguments, and respondents have previously acknowledged that the court was punishing Ford for harms to other parties resulting from sales of other vehicles. Pet. App. 107a, 55a-57a. Respondents argue that because the court analyzed the third party evidence under the rubric of "reprehensibility," there is no constitutional problem. Opp. 22-24. But this was true of the opinion *Philip Morris* reversed. 127 S. Ct. at 1064-1065. Because the Due Process Clause forbids "a jury to base [a punitive damage] award *in part* upon its desire to *punish* the defendant for harming persons who are not before the court," *id.* at 1060 (first emphasis added), and "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring," *id.* at 1065, any ambiguity on the precise use of alleged third-party harms below requires vacatur and remand. *See Henry* v. *City of Rock Hill*, 376 U.S. 776, 776 (1964) (remand proper if "not certain that the case [is] free from all obstacles to reversal on an intervening precedent").

[Footnote continued from previous page]

equation. . . . The trial will not likely answer such questions as to non-party victims. The jury will be left to speculate."). And respondents did elicit testimony about other Explorer and Bronco II cases, including those that "involved people getting hurt or killed," RT 7963, and asked a Ford expert if he had examined the "data of the people that have been brain damaged, quadriplegia, paraplegia in Ford rollover accidents," supposedly contained on disks counsel "represented[ed were] evidence in this case" and that "would take you several hundred hours to go through." RT 7961. Respondents also introduced evidence on the Bronco II's *fatal* rollover rate, *see, e.g.*, 1265-1266, calling this its "death record." RT 669.

Respectfully submitted.

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April 16, 2007

APPENDIX A

Case No. ___

IN THE
SUPREME COURT OF CALIFORNIA

BENETTA BUELL-WILSON et al.,

Plaintiffs and Respondents

v.

FORD MOTOR COMPANY, et al.

Defendants and Appellants.

After A Decision By The Court of Appeal
Fourth Appellate District, Division 1, Case Nos.
D045154, D045579

San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

1. In a product liability design case, is evidence of industry standards and custom, including the product's real-world safety performance relative to comparable products, relevant to the issues of design defect and punitive damages?

2. In a product liability design case, can malice within the meaning of Civil Code section 3294 be deemed established by clear and convincing evidence against a motor vehicle manufacturer where (a) the vehicle complies with applicable federal standards that are required by law to "meet the need for motor vehicle safety," (b) the federal government has rejected the precise standards used by plaintiffs' expert to condemn the product as defective, (c) the vehicle is as safe or safer than comparable vehicles, and (d) there is an objectively reasonable, genuine debate over whether the product is defective?

3. In evaluating punitive damages pursuant to the federal due-process *de novo* review standard, may a court (a) apply the state-law substantial evidence test to presume that the jury made findings it did not expressly make and to disregard objective factors mitigating reprehensibility, and (b) punish the manufacturer's lawful conduct, including its sale of a product to third parties not before the court, even where the manufacturer prevailed in the previous eleven cases involving that same product?

WHY REVIEW SHOULD BE GRANTED

The decision below creates new and draconian rules for product liability cases, including a virtual liability-without-fault standard for punitive damages. Unless reviewed and overturned, that decision will render it irrelevant that a manufacturer's design decisions resulted in a product that complies with industry standards and custom, comports with relevant federal safety standards and reasonable policy judgments, and performs as well or better than comparable competing products. In place of these knowable standards, the decision substitutes a vague regime that will permit tens of millions of dollars of punishments to be imposed if a jury deems a manufacturer's conduct "despicable" on the strength of nothing more than a finding that, as will almost always be the case, the product might possibly have been made "safer" if more money had been spent in making it. That is neither constitutional nor rational. Review is necessary to conform California's product liability and punitive damage law to reason, common sense, and the United States Constitution.

Before this product design trial, eleven Ford Explorer cases involving similar claims had gone to judgment, and in *all eleven* cases judgment was entered in favor of Ford Motor Company (hereafter "Ford"). (Appellant's Appendix 1154-1237 (hereafter "AA").) But in this case, the jury returned split verdicts finding that the Explorer was defective, and that Ford had acted with "malice" in designing it. The jury

awarded an astonishing $368 million in compensatory and punitive damages.

Although the Court of Appeal found that the jury was inflamed by "passion and prejudice" and not acting as a "fair and neutral trier of fact" (*Buell-Wilson v. Ford Motor Company* (August 17, 2006, D045154, D045579) slip opinion, p. 37 (hereafter "slip opn.")), and thus reduced the compensatory and punitive damages to $82.6 million, it otherwise affirmed the judgment. In so doing, the court declared that the jury was empowered to regulate automotive safety – even to the point of overriding the federal agency expressly charged by Congress with this responsibility – "because '[g]overnmental safety standards . . . have failed to provide adequate consumer protection.'" (*Id.*, pp. 49-50.) At the same time, in deciding three important issues of law, the court jettisoned as irrelevant the most reliable and objective information for making decisions about product design and safety.

First, the court held as a matter of law that industry standards and custom – including comparative accident statistics showing that the product was as safe or safer than comparable products – are "irrelevant not only to the issue of defect, but also to punitive damages." (Slip opn., p. 24.) This holding departs from the reasoning of *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413 (hereafter *Barker*), extends a split among the California courts of appeal, and places California at odds with the majority of other jurisdictions, as well as the Restatement Third of Torts, Product Liability. The court's ruling that it is "reversible error" (slip opn., p. 23) to allow introduction of such data regarding how products comparatively perform in the real world will preclude both plaintiffs and defendants from providing juries with the most crucial information – precisely the kind that actual governmental regulators themselves would rely on – for making decisions about public safety. (See *Daly v. Gen. Motors Corp.* (1978)

20 Cal.3d 725, 746 ["Product designs do not evolve in a vacuum, but must reflect the realities of the market place, kitchen, highway, and shop"]; *Bammerlin v. Navistar Int'l Transp. Corp.* (7th Cir. 1994) 30 F.3d 898, 901 ["Jurors are not engineers, and data on accident rates speak more loudly than abstract arguments"].)

Second, the court held that juries are authorized to deem a manufacturer's design decisions malicious, and impose severe punishment, even where undisputed, objective indicators – such as ongoing genuine debate in the engineering community, accident data showing the product is among the safest in its class, and governmental regulatory decisions confirming the manufacturer's judgment – affirmatively refute malice as a matter of law. This ruling contradicts California law, decisions from other jurisdictions, and due process. This issue is especially important because punitive damages "pose an acute danger of arbitrary deprivation of property." (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-18 (hereafter *State Farm*).) The danger is heightened in design defect cases, which require jurors to second-guess complex policy judgments, in hindsight, regarding whether a product's utility outweighs its risks, and always in the context of an accident resulting in tragic personal injuries likely to provoke the jury's passion.

Third, the court misinterpreted the due-process excessiveness standards governing punitive damages. These standards require "exacting" *de novo* judicial scrutiny (see *State Farm, supra*, pp. 417-18), but the court conflated *de novo* review with state-law substantial evidence analysis and, as a result, declined to consider key objective factors in upholding a record-setting $55 million punishment. Instead, the court relied on factors condemned by *State Farm*, such as Explorer sales to consumers not before the court, even though Ford had prevailed in the eleven prior Explorer cases.

For these reasons, this Court should grant review.

* * * * *

II. This Court Should Grant Review To Address The Standards For Imposing Punitive Damages In Product Design Cases Under Section 3294

Civil Code section 3294 permits punitive damages only where it is proven by clear and convincing evidence that the defendant has been guilty of "malice." Section 3294, subdivision (c)(1) defines "malice" as "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." The "despicable conduct" requirement, which was added in 1987, requires proof of "conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people." (CACI No. 3945; *see also College Hosp., Inc. v. Superior Court (Crowell)* (1994) 8 Cal.4th 704, 725 ["the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible'"]

The Court of Appeal held that punitive damages could be assessed against Ford in this case even though (i) the Explorer complies with applicable federal standards (FMVSS 216 governing roof crush); (ii) the federal government has rejected the precise stability standards used by plaintiffs to condemn the Explorer as defective (the stability index and CU testing); (iii) the Explorer is one of the safest vehicles in its class with respect to rollovers; and (iv) there is an objectively reasonable, genuine debate about whether the Explorer was defective.

Collectively, these facts compel an affirmative finding that Ford's conduct was not despicable. The Court of Appeal, however, relying on *Grimshaw*, which was decided five years before the despicability requirement was added to section 3294, disregarded the federal government's actions and decisions, finding that "'[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection" and punitive damages therefore "remain as the

most effective remedy for consumer protection." (Slip opn., pp. 49-50.)

The Court of Appeal did not cite any evidence to support this assertion. Moreover, twelve years after *Grimshaw*, in *Ramirez v. Plough* (1993) 6 Cal.4th 539, this Court recognized the deference that should be given to federal standards in tort actions involving "matters that are peculiarly susceptible to legislative and administrative investigation and determination." (*Id.* at p. 553.) *Ramirez* was a product liability action alleging that nonprescription drug manufacturers failed to provide warnings in Spanish. While the Food and Drug Administration (FDA) regulated the labeling of nonprescription drugs, and had studied and encouraged the use of multilingual labeling, it had taken no action to require warnings in any language other than English. (*Id.* at pp. 549-550.) The FDA had "presumably" concluded that "despite the obvious advantages of multilingual package warnings, the associated problems and costs are such that at present warnings should be mandated *only* in English." (*Id.* at p. 552, italics added.) Recognizing that courts "lack[] the procedure and resources to conduct the relevant inquiries" into matters of this nature, this Court "adopt[ed] for tort purposes the existing legislative and administrative standard of care on this issue" and affirmed summary judgment for the drug manufacturers on *compensatory damages*. (*Id.* at pp. 553, 555.)

This Court's deference to the *presumed* decisions of one federal agency in *Ramirez* starkly contrasts with the Court of Appeal's lack of deference to the *actual* decisions of another federal agency. Roof crush and rollover issues present at least as much complexity as issues relating to multilingual warnings. (See, e.g., AA661-671 [64 Fed.Reg. 27343-27353 (May 19, 1999)].) And NHTSA has demonstrated considerable attention and "sensitivity" to rollover and roof crush issues. (See *ibid.*) In fact, while this Court in *Ramirez* had to "presume[]" from the FDA's inaction that it had made a de-

liberate decision not to require multilingual warnings, there is no need to presume or infer anything in this case: NHTSA has *expressly* adopted a safety standard on roof crush, and it has *expressly* rejected both stability index and CU testing as methods for making defect determinations. (See pp. 8-11, *ante.*)

The Court of Appeal also rejected Ford's contention that Ford is not subject to punishment under section 3294 if reasonable people could disagree about whether the Explorer was defective. (Slip opn., p. 46.) But if "despicable" conduct means "conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people" (CACI No. 3945), it follows that the sale of an allegedly defective product cannot be despicable if people could reasonably disagree with the jury's conclusion that the product was defective. Numerous courts have applied some version of this analysis in deciding whether punitive damages are barred in a variety of contexts. (See, e.g., *Satcher v. Honda Motor Co.* (5th Cir 1995) 52 F.3d 1311, 1317 [vacating punitive award where, inter alia, "there is a genuine dispute in the scientific community" regarding reasonableness of design]; *Hillrichs v. Avco Corp.* (Iowa 1994) 514 N.W.2d 94, 100 ["an award of punitive damages is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue"].)

California courts have for years applied this analysis in the insurance bad faith and other areas of the law. (See *Chateau Chamberay Homeowners Assn. v. Associated Int'l Ins. Co.* (2001) 90 Cal.App.4th 335, 348, 351, fn. 10 [when there is a "genuine dispute" over legal and factual issues, evidence will not support punitive damages]; see also *Lusardi Constr. Co. v. Aubry* (1992) 1 Cal.4th 976, 996-997 ["[C]ourts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions."]; *Kendall Yacht Corp. v. United*

Cal. Bank (1975) 50 Cal.App.3d 949, 958-959 [rejecting claim for punitive damages because it "remains purely speculative as to whether the Bank acted with such malice rather than out of a bona fide disagreement over how far the Bank was required to go in helping the Kendalls with their financial problems"].)[1]

The arguments for such an approach are even more compelling in the product liability context. Professor David Owen, upon whose writings the court in *Grimshaw* so heavily relied, made this precise point more than a quarter of a century ago:

> If [design] decisions fall within any reasonable distance of the 'defect line,' even if in hindsight proven wrong, fairness requires that they ordinarily be judged to have been made in good faith. Stated in another way, even if the product is finally found "defective," the case for punitive damages almost always will be quite weak if a plausible case for nondefectiveness was made the other way. Such damages usually will not be appropriate unless the product was very defective, and plainly so, at the time it was sold. A plaintiff usually should be entitled to a directed verdict on defectiveness, or close thereto, before the punitive damages issue is properly before the jury at all.

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[1] The Court of Appeal dismissed such authority as "cases where there was simply a failure of proof to support a punitive damages award." (Slip opn., pp. 46-47.) But this is wrong, because the proof failed in these cases precisely because the defendant had objectively reasonable grounds for its conduct.

(Owen, *supra*, 49 U.Chi.L.Rev. at pp. 37-38.)

The Court of Appeal interpreted this argument to mean that "punitive damages would never be allowed in cases where the defendant simply had an expert that disagreed with the plaintiff's expert." (Slip opn., p. 46.) But this substantially oversimplifies Ford's argument, Professor Owen's analysis, and the holdings of the cases on which Ford relies. A mere disagreement between *testifying* experts would not necessarily preclude punitive damages, if the jury has a basis for concluding that the defendant's expert's opinion is so lacking in logic and support in the scientific community that there is no arguable justification for the defendant's decisions. On the other hand, if the disagreement between the testifying experts in the courtroom is reflects a serious and significant policy debate in the larger engineering, scientific, and regulatory communities, punitive damages are not a sensible way to resolve that debate. (Cf. *Self, supra*, 42 Cal.App.3d at p. 7 ["prosecution of a lawsuit is a poor way to design a motor vehicle"]; W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?* (2000) 52 Stan.L.Rev. 547, 550-551, 556, 589-590.)

In short, if the issue of product defect is reasonably debatable *and* the conduct of the manufacturer comports with the policy judgment of governmental experts *and* the product is one of the safest in its class, malice cannot be established by clear and convincing evidence.

The Court of Appeal, while not disputing any of these facts, nevertheless found substantial evidence existed to support the jury's punitive damage verdict because "Ford decision makers knew how to make the Explorer less dangerous, but chose not to because of financial considerations." (Slip opn., p. 47.) But this statement conflates a manufacturer's knowledge that a product *can* be made "safer" (which is almost always possible, though perhaps to the detriment of other desirable product attributes, including cost to the con-

sumer) with a manufacturer's "knowledge" that a product *should* be made safer, i.e., that it is "defective." *Barker* holds that "the financial cost of an improved design" is a perfectly legitimate factor to consider in determining whether a product is defective. (20 Cal.3d at p. 431.) Accordingly, a manufacturer's decision not to make a product it believed to be safe even safer for reasons of cost is not even negligent, let alone despicable. (*See Phillips v. Cricket Lighters* (Pa. 2005) 883 A.2d 439, 447 ["We flatly reject [the plaintiff's] assertion that [the defendants'] weighing of financial concerns in determining whether to incorporate additional safety features into its product on a unilateral basis establishes that [the defendants] acted wantonly"].)

This Court has not addressed the liability of product manufacturers for punitive damages since section 3294 was amended in 1987; in fact, this Court has not addressed this issue for almost a quarter century. As a result, the *Grimshaw* decision continues to distort the law in this area. While Ford believes that the Court of Appeal erred in its interpretation of section 3294, the court thoroughly examined the arguments of Ford and the *amicus curiae*, providing this Court with an especially good record for examining these important issues.[2]

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[2] Review is also needed because the Court of Appeal's interpretation of section 3294 renders it unconstitutionally vague as applied in this case, both because Ford did not have notice sufficient to tailor its conduct to avoid punishment and because of the risk of arbitrary and discriminatory enforcement. (See, e.g., *City of Chicago v. Morales* (1999) 527 U.S. 41, 56; *Connally v. General Constr. Co.* (1926) 269 U.S. 385, 391-92; *Southwestern Tel. & Tel. Co. v. Danaher* (1915) 238 U.S. 482, 491; *Hewitt v. State Bd. of Med. Exam'rs* (1906) 148 Cal. 590, 592-593.)

III. This Court Should Grant Review To Clarify The Standards For Scrutinizing Punitive Damages For Excessiveness Under The Due Process Clause In The Product Liability Context

Even as reduced, the $55 million punitive damage award remains the largest single-accident personal injury punitive damage award ever affirmed on appeal in California history. The Court of Appeal's decision upholding this punishment contradicts *State Farm, supra,* 538 U.S. 408, and *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, and the decisions of this Court and other courts, and it will sow confusion and injustice unless this Court grants review.

* * * * *

B. Misinterpretation Of The Reprehensibility Guidepost

As a result of its misunderstanding of *de novo* review, the Court of Appeal failed to take into account the multiple objective factors – such as industry standards and custom, federal regulatory decisions, and the genuine debate on these complex design issues – discussed above in Sections I and II, *ante.* Even if these factors do not completely bar punitive damages, they are relevant to gauging the reprehensibility of Ford's conduct. (*BMW*, *supra*, 517 U.S. at pp. 565, 570-571, 577-578 [considering defendant's compliance with statutes in other states in evaluating reprehensibility]; *Clark v. Chrysler Corp.* (6th Cir. 2006) 436 F.3d 594, 602 [cutting $3 million punitive award to approximately $470,000 in design defect wrongful death case where the evidence established at most "a good-faith dispute over whether B-pillar testing is necessary"].)

The Court of Appeal incorrectly found Ford's conduct "more reprehensible" because it was "repeated and not an isolated incident" (slip opn., p. 60), based on the fact that Ford mass-marketed the Explorer as well as the Bronco II.

This ruling contradicts *State Farm*, as well as *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, because the court punished Ford for conduct toward third parties not before the court and their "hypothetical claims," "without ever proving the specifics of those 'hypothetical claims.'" (*Id.* at p. 1210, quoting *State Farm*, *supra*, 538 U.S. at p. 423.)

As the record reflects but the Court of Appeal did not mention, Ford *won* the eleven prior trials alleging defects in the Explorer. (AA1154-1237.) By simply assuming that every sale of the Explorer is an example of "repeated" misconduct the court effectively nullified those eleven prior victories (and others since), and inflicted punishment based on conduct exonerated by other juries.[3] The court has also subjected Ford to the threat of duplicative punishment in future cases that rely on the same supposed "repeated" conduct to impose additional punitive damages for marketing the Explorer. (See *Johnson,* 35 Cal.4th at pp. 1209-1210; see also *Williams v. ConAgra Poultry Co.* (8th Cir. 2004) 378 F.3d 790.)

If reprehensibility is properly evaluated, the necessary conclusion is that Ford's conduct was not remotely reprehensible. The proper evaluation of alleged reprehensibility is a recurring and important issue in product liability cases that deserves this Court's attention. At a minimum, this Court should grant and hold this case pending the Supreme Court's decision in *Philip Morris USA v. Williams* (Or. 2005) 127 P.3d 1165 (upholding $79 million punitive award), cert. granted May 30, 2006, No. 05-1256, __ U.S. __ [126 S.Ct. 2329]; cf. *Bullock v. Philip Morris USA, Inc.*, S143850.

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[3] Since the verdict here, Ford has prevailed in the majority of Explorer trials.

APPENDIX B

No. D045154

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BENETTA BUELL-WILSON and BARRY S. WILSON

Plaintiffs, Respondents, and Cross-Appellants,

v.

FORD MOTOR COMPANY and DREW FORD

Defendants, Appellants and Cross-Respondents.

On Appeal From The San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

PETITION FOR REHEARING

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3. The Court Erred In Holding That Industry Standards And Custom Evidence Is Irrelevant To The Jury's Punitive Damages Analysis

The Court incorrectly holds that industry standards and custom evidence is "irrelevant" to the issue of punitive damages, again erroneously relying upon *Grimshaw*. Op. 24, 50. The Court incorrectly finds it insignificant that *Grimshaw* predates the important 1987 amendments to section 3294, which added, among other things, the requirement that a plaintiff prove that a defendant's conduct was "despicable." *Grimshaw*'s version contained no definition of "malice" at all, and provided for the imposition of punitive damages based on an undefined "implied" malice. *See* Op. 50; *see also* Cal.Civ.Code § 3294, amended by Stats. 1987, ch. 1498 § 5; *Grimshaw*, 119 Cal.App.3d at 807-8, 818.

The Explorer's safety record is highly relevant to the objective inquiry into whether Ford's design decisions with regard to the Explorer were "despicable," which is defined as conduct "so vile, base, or contemptible that [they] would be looked down on and despised by reasonable people." CACI 3945; Civ.Code § 3294(c)(1). This standard is one for which evidence of, inter alia, comparative industry data,

standards, and customs is clearly relevant. It was highly prejudicial error to exclude this evidence.

Moreover, such evidence was highly relevant here to the due process issue of the degree of reprehensibility of Ford's conduct. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418-19; *see* Section I.I., *infra*.

* * * * *

4. The Court Misapprehends The Nature Of Ford's Challenge To Civil Code Section 3294 On Vagueness Grounds

The Court erroneously rejected Ford's challenge to punitive damages on vagueness grounds, stating that "Ford made just this argument 25 years ago in *Grimshaw, supra,* 119 Cal.App.3d 757. The Court of Appeal rejected it, concluding that 'punitive damages are recoverable in a nondeliberate or unintentional tort where the defendant's conduct constitutes a conscious disregard of the probability of injury to others.'" Op. 54. But the challenge in *Grimshaw* was a *facial* challenges to the statute and punitive damage standards, *i.e.*, an argument that the standards are unconstitutionally vague *in all cases*. *See Grimshaw,* 119 Cal.App.3d at 811 (rejecting challenge to constitutionality of statute on general ground it has been "clear that a manufacturer of a dangerous, defective product might be liable for punitive damages if it knowingly exposed others to the hazard"). Ford's argument here is not that section 3294 is, on its face invalid; Ford agrees that the statute can in fact be constitutionally applied to some fact patterns.

Instead, Ford's vagueness challenge asserts that, while the statute's language might be constitutional as applied to certain kinds of conduct, that same language can be unconstitutionally vague when applied in other contexts, and thus "vagueness challenges . . . must be examined in the light of the facts of the case at hand." *United States v. Mazurie*

(1975) 419 U.S. 544, 550; *see also A.B. Small Co. v. Am. Sugar Ref. Co.* (1925) 267 U.S. 233, 239; *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 775 (vagueness challenge must be evaluated "in light of the facts of the case at hand") (citing *Mazurie*).

No California decision, including *Grimshaw*, addresses whether Section 3294's punitive damage liability standard, while adequate in some other contexts, is unconstitutionally vague as applied to the design defects alleged in this case. As Ford demonstrated, section 3294, is unconstitutionally vague as applied to the facts here.

Indeed, the Opinion drives home just how vague the punitive damages standard is as applied in this context. The Court holds that manufacturers cannot rely on federal regulations to guide their conduct because "[g]overnmental safety standards . . . have failed to provide adequate consumer protection." (Op. 49-50) They cannot consider industry standards or custom, or even actual data regarding how the product is performing in the real world, because this is "irrelevant not only to the issue of defect, but also to punitive damages." (Op. 24) And they cannot rely on the judgment of their engineers and managers that a product is safe, where other engineers have proposed other design changes. (Op. 46-47). If this is a correct interpretation of California law, then section 3294 is unconstitutionally vague as applied here because Ford has no guidance as to the legality of its conduct. *Cf. A.B. Small*, 267 U.S. at 239-40 (statute unconstitutionally vague because "there was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute"); *ACLU v. Board of Education* (1963) 59 Cal.2d 203, 218.

* * * * *

I. The Court's Ruling That The $55 million Punitive Damage Award Comports With Due Process Is Erroneous And Warrants Rehearing

This Court concluded that the $75 million punitive damage award was "excessive," and reduced it to $55 million. Op. 57. But this is still grossly excessive and unconstitutional. Indeed, it remains the largest single accident personal injury punitive damage award ever affirmed on appeal in California history. This Court should grant rehearing and hold that, as a matter of due process, the punitive damage award should be set aside in its entirety because Ford's conduct was not sufficiently reprehensible to justify an additional sanction over and above the $27.6 million compensatory damage award. *See State Farm*, 538 U.S. at 419 ("[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should *only* be awarded if the defendant's culpability, after having paid compensatory damages, is *so* reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence") (emphases added). In the alternative, the Court should further reduce the punitive damage award so that it bears no more than a 1:1 ratio to the compensatory award.

* * * * *

3. The Court also committed constitutional error in its interpretation of the *State Farm/Gore* reprehensibility guidepost by failing to consider any objective factors bearing on that issue. Applying its erroneous and highly deferential standard of review as to the facts, and referring back to its earlier analysis of the facts under state law, the Court states that the "reprehensibility of Ford's acts was high" (Op. 59-60), but in doing so the Court disregards all of Ford's evidence to the contrary as well as numerous objective factors that must be considered in deciding reprehensibility in the product liability context, including whether (a) there are rea-

sonable, good faith grounds for disagreement regarding the product design issues that form the basis for liability; (b) the product conforms to governmental safety standards or policy decisions; (c) the product conforms to industry standards and custom; and (d) the challenged conduct was part of a good faith effort by the manufacturer to design a lawful product that consumers would find desirable.

These factors are directly relevant to whether Ford's conduct "evinced a reckless disregard for the safety of its customers" (Op. 60) and was "reprehensible" for purposes of the due process analysis.[1] Along with the other portions of the record the Court refused to consider, these factors show Ford acted in good faith in seeking to design a reasonably safe vehicle, refuting both malice and reprehensibility. AOB 40-56; ARB 32-34,36-44, 46-49. There is substantial evidence that Ford management and engineers believed that the Explorer would be an exceedingly safe and stable vehicle, which it was—though the Court excluded Ford's "real world" evidence on that point. Ford's good faith belief that its conduct was lawful was based on, among other things, its compliance with federal safety standards and industry custom, and eliminates, or at the very least mitigates significantly, any reprehensibility. *See BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 565, 570-71, 577-78 (defendant's reliance on other state statutes authorizing the conduct at issue was reasonable and substantially mitigated reprehensibil-

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[1] The Court states that the purported evidence of such reprehensibility was "primarily adduced through Ford's own internal memoranda and correspondence." Op. 61. The Court omits that such a conclusion could be deduced only from: (1) misleading snippets of those documents, from which the opposite conclusion is drawn if the documents are read as a whole, and (2) a failure to appraise the record as a whole.

ity); *see also Clark v. Chrysler Corp.* (6th Cir. 2006) 436 F.3d 594, 602 (cutting $3 million punitive award to approximately $470,000 in design defect wrongful death case where the evidence established at most "a good-faith dispute over whether B-pillar testing is necessary").

4. This Court erroneously placed undue emphasis on the injuries suffered by Mrs. Wilson as part of the reprehensibility analysis. Op. 59-60. *All* products pose risks that persons will be seriously injured or killed when using the products, *see Corrosion Proof Fittings v. E.P.A.* (5th Cir. 1991) 947 F.2d 1201, 1223 n.23 ("over the next 13 years, we can expect more than a dozen deaths from ingested toothpicks"), so an analysis focusing on whether the manufacturer "knew" of such risks and whether such risks were realized as to the plaintiff provides no meaningful guidance, especially in the context of automobiles, which by their very nature pose significant safety risks.

By placing so much emphasis on the pain suffered by Mrs. Wilson in its reprehensibility analysis (Op. 59) the Court effectively double punished Ford because the large non-economic damage award already addresses Mrs. Wilson's pain and suffering in violation of *State Farm.* 538 U.S. at 426 ("The compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award.

5. The Court incorrectly found Ford's conduct "more reprehensible" because it was "repeated and not an isolated incident." Op. 60. To the extent that the Court is suggesting that Ford's conduct was "repeated" because Ford mass-marketed the Explorer, this ruling violates due process. It flatly violates *State Farm*, as well as *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, because the Court is punishing Ford for its conduct as to third parties not before the Court and "hypothetical claims" of those third parties, "without ever proving the specifics of those 'hypothetical claims.'"

Id. at 1210 (quoting *State Farm*, 538 U.S. at 423). Moreover, as the record reflects but this Court does not mention, Ford *won* the 13 prior trials alleging defects in the Explorer. By simply assuming that every sale of the Explorer is an example of "repeated" misconduct this Court has effectively wiped out those thirteen prior victories (and others since), and inflicted punishment based on conduct exonerated by other juries. The Court has also subjected Ford to the threat of duplicative punishment in future cases that rely on the same supposed "repeated" conduct to impose additional punitive damages against Ford for marketing the Explorer. *See Johnson v. Ford*, 35 Cal.4th at 1209-10; *see also Williams v. ConAgra Poultry Co.* (8th Cir. 2004) 378 F.3d 790. This Court's endorsement of the use punitive damages as a regulatory mechanism to augment supposedly inadequate consumer protection efforts by the government, Op. 49-50, suffers from the same due process problems.

To the extent the Court's "repeated misconduct" analysis intended to refer to plaintiffs' claim Ford repeated its purported design errors in the Bronco II when it designed the Explorer, it violates due process for similar reasons. This mode of analysis punishes Ford for its design of the Bronco II, a vehicle that is not at issue in this case, and for conduct as to Bronco II purchasers, third parties not before the Court. This, in turn, eradicates Ford's victories in Bronco II cases, imposes duplicative punishment to the extent Ford has already been subjected to punitive damages in a Bronco II case, and punishes Ford for conduct that is dissimilar from the conduct that harmed the plaintiffs before this Court. *State Farm*, 538 U.S. at 423.

5. The Court's statement that "the jury finding that Ford acted with 'oppression, fraud or malice' demonstrates that Ford's actions were intentional" (Op. 61), is both factually and legally incorrect. Ford did not intend to injure the Wil-

sons and the theory of underlying liability is strict liability—the opposite of an intentional tort.

This Court's analysis, however, conflates an intentional act, a design decision, with an intent to cause harm. Under *State Farm* and *Gore*, the relevant "intent" is an intent to cause injury, not an intent to adopt the challenged design.

6. The Court erroneously stated that Ford's consideration of "financial incentives" makes its conduct reprehensible. Op. 60. As discussed above, it was wholly appropriate, indeed legally required, for Ford to consider financial costs in designing products. *See Phillips*, 883 A.2d 439 at 4457 ("[we] flatly reject [the plaintiff's] assertion that [the defendants'] weighing of financial concerns in determining whether to incorporate additional safety features into its product on a unilateral basis establishes that [the defendants] acted wantonly").

7. The Court also erroneously concludes that the purported reprehensibility of Ford's conduct was high because Ford's "target" was "vulnerable" consumers who "would not understand vehicle design, development and manufacture." Op. 60. The proper inquiry is whether the defendant targeted "*financially* vulnerable" persons—and this factor is intended to be used in financial tort cases, not in a product liability case. *See State Farm*, 538 U.S. at 419. There was no evidence that Ford targeted plaintiffs for this reason, or that plaintiffs were financially vulnerable, or that any financial vulnerability contributed to their injuries. Finally, this analysis improperly punishes Ford for its alleged conduct as to third parties not before the Court—supposed other "vulnerable" consumers—in further violation of due process.

8. The Court also misapplied the ratio of punitive damages to compensatory damages guidepost here. The Court erroneously concludes that a two-to-one ratio is warranted because Ford's reprehensibility is purportedly high. Op. 63. As discussed *supra*, the Court has misapplied the reprehensi-

bility guidepost and is mistaken in this conclusion, and thus there is no basis for a two-to-one ratio here. Moreover, given the enormous and punitive nature of the noneconomic damages award here, even a one-to-one ratio is too high here. *See State Farm*, 538 U.S. 435 ("[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages can reach the outermost limit of the due process guarantee").

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APPENDIX C

No. D045154

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BENETTA BUELL-WILSON and BARRY S. WILSON

Plaintiffs, Respondents, and Cross-Appellants,

v.

FORD MOTOR COMPANY and DREW FORD

Defendants, Appellants and Cross-Respondents.

On Appeal From The San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

APPELLANTS' OPENING BRIEF

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INTRODUCTION

The jury awarded the sole occupant in a single-vehicle rollover accident (and her husband) more than ***$368,000,000***. The superior court reduced the award to ***$150,000,000***, but that judgment itself is unlawful, unprecedented, and unconstitutional.

This case involves the 1997 Ford Explorer 4x4, a popular sport utility vehicle. Before this trial, thirteen Explorer cases involving similar claims went to judgment, and in *all thirteen* cases judgment was entered in favor of Ford. Several juries expressly found the Explorer non-defective. In this case, plaintiffs were allowed to focus much of their case, over Ford's continuing objection, on a different, older vehicle: the Ford Bronco II. Bronco II evidence, spanning decades, permeated the trial, and plaintiffs' primary strategy was to blur the distinction between the Explorer and the Bronco II and confuse the jury so that it would impose liability and punishment based on a vehicle that did not injure these plaintiffs and was not at issue in the case.

While admitting extensive irrelevant evidence about the Bronco II, the trial court also excluded highly relevant evi-

dence about the vehicle at issue, the 1997 4-door Explorer. Among other things, plaintiffs were allowed to attack the *Explorer* with the allegedly excessive rollover rate of the *Bronco II* compared to other vehicles, but the court *precluded* Ford from defending the Explorer with its *own* real-world rollover rate compared to other vehicles. This evidence was critical both to distinguish the Explorer from the Bronco II and to show that the Explorer's risk of injury from rollover is not excessive. Evidence of the extent of the risk that plaintiffs' claim is excessive is obviously relevant to the basic liability issue—*i.e.*, whether the risks of the challenged design exceed its utility—as well as central to the punitive damage inquiry. It also would have served to debunk plaintiffs' primary theory that the so-called "static stability index" of a vehicle determines its risk of rollover and that the Explorer was defective simply because its static stability index was similar to that of the Bronco II.

The double-barreled effect of these erroneous evidentiary rulings, which allowed plaintiffs to conduct a full trial of the Bronco II while preventing Ford from defending the Explorer, was highly prejudicial, and violated both California law and due process, as evidenced by the grossly excessive verdict. The jury awarded ***$118,000,000*** in non-economic damages, which was more than five times the amount even plaintiffs contended the evidence supported. The court reduced the compensatory award to $75,000,000, but it remains irrational, punitive, tainted by passion and prejudice, and grossly excessive, especially when compared to the largest awards upheld for similar injuries in other California cases.

In addition to finding the Explorer defective, the jury determined—by the slimmest of margins (9-3)—that the Explorer's design warranted severe *punishment*. But the 1997 Explorer:

- complied with all relevant government safety standards,

- passed all of the handling and stability tests advocated by plaintiffs' own expert,
- passed all of Ford's internal handling and stability tests,
- passed the Consumers Union test, which plaintiffs suggested throughout the trial was the most important of all the tests of stability in "accident avoidance maneuvers" like those involved in this case, and
- has a risk of rollover comparable to other SUVs.

The regulatory agency responsible for automotive safety has consistently rejected plaintiffs' theory that a minimum "static stability index" well above that of the Explorer and other SUVs is necessary for automotive safety. And as noted above, numerous juries presented with the same defect claims have concluded the Explorer is not defective, and some of the jurors in this case agreed.

In short, there indisputably is a sufficient basis for reasonable people, including Ford engineers and managers, to conclude that the Explorer's design was not defective. Plaintiffs presented evidence that, at most, would allow reasonable people to disagree. California law does not allow punitive damages when reasonable people can disagree about the lawfulness of the conduct at issue. Indeed, if California law were interpreted to allow punitive damages in this case, that law would be unconstitutionally vague as applied in violation of the Due Process Clauses of the California and U.S. Constitutions because it failed to provide fair notice of what conduct is punishable and allows arbitrary and discriminatory law enforcement by individual juries.

Yet the jury awarded ***$246,000,000*** in punitive damages, more than twice the amount plaintiffs requested. The court reduced that award to a still record-setting, grossly excessive,

and unconstitutional $75,000,000. The court also allowed the jury to base its punishment on Ford's worldwide wealth and profits in direct violation of this Court's decision in *People v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1289.

Accordingly, Ford is entitled to judgment in its favor regarding punitive damages and a new trial as to all other issues.[1] At a minimum, this Court should order a new trial on all issues or a very substantial remittitur.

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ARGUMENT

I. Ford Is Entitled To A New Trial Because Of Several Highly Prejudicial, Erroneous Evidentiary Rulings

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The superior court abused its discretion with respect to two key evidentiary issues, in violation of California law and due process. The importance of these errors is underscored by the serious due process implications of preventing a defendant facing unprecedented punishment from presenting relevant evidence in its defense (*see People v. Reeder* (1978) 82 Cal.App.3d 543, 552-53) and allowing irrelevant and improper evidence to be used in support of such punishment. *See State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423.

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[1] A reversal of the judgment also would require a reversal of the post-trial order awarding costs.

A. Admitting Extensive Evidence About The Bronco II Was Erroneous And Prejudicial

The plaintiffs in *all thirteen* previous Explorer cases to go to verdict lost. AA1154-1237.[2] Faced with that record, plaintiffs pulled a bait-and-switch by basing much of their presentation not on the relevant vehicle—the Explorer—but on a *different* vehicle, the Bronco II, which had ceased production by 1990. The decision to allow this irrelevant evidence over Ford's objection was erroneous and prejudicial.

Plaintiffs argued throughout trial that the Explorer was merely a renamed, retooled Bronco II; focused much of their opening and closing arguments on the Bronco II; spent the better part of four days examining witnesses about the Bronco II; and based much of their experts' testimony on the design and stability characteristics of the Bronco II, as well as evidence of some unspecified parts carryover from the Bronco II to the Explorer. *See, e.g.*, RT662:19-690:13, 1255:6-17, 1269:11-1272:17, 1274:26-1275:19, 8169:5-8179:14, 8508:22-24, 8509:8-9; AA2533. They argued the Bronco II had been "singled out . . . among compact utility vehicles" because of its "death record" (RT669:12-17) and elicited testimony from their experts that "data shows the Bronco II to have a higher fatal rollover rate relative to certain competitors," and that its "rollover rate is three times higher than the Chevy S-10 Blazer." *E.g.*, RT1265:1-1266:27; 1247:12-1252:27, 1265:1-1266:27, 1269:11-1270:5, 2847:5-2851:11, 2852:2-15, 2858:13-2879:25, 2890:18-20; AA2111-2476, 2524-2526. Plaintiffs examined witnesses at length about the Bronco II's development

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[2] The superior court refused to allow Ford to present argument about those verdicts to the jury in defense of the punitive damage claim. RT8452:22-8453:5, 8534:26-8537:15; 8516:12-26.

(RT1247:12–1304:17, 2858:13-2945:25, 2970:15-3058:2, 3266:18-3313:18); marketing strategy (RT2982:24-2983:1); litigation, including discovery responses (RT1241:9-12, 2848:24-27); and allegedly missing Bronco II documents from the 1970s and early 1980s. RT2877:19-2878:3.

Plaintiffs' counsel even encouraged the jury to impose punitive damages based on the Bronco II alone: "They go ahead and release the Bronco II in 1983 . . . without recommended track width and [center of gravity] changes, knowing it will roll over and kill and or catastrophically injure many people, which it has. Fraud, oppression, malice, these are issues that relate to the last question on the verdict form . . . the most importance [sic] you will give in this case. And that is yes. Hopefully. . . . [Y]ou learned about the Office of the General Counsel confiscating [Bronco II] stability documents. 53 of those documents are missing. This is the report to the Consumers Union. Bronco II. . . . Quotation in the document. 'We are in deep trouble regarding our rollover rates. Our rollover rate is three times higher than the Chevy S-10 Blazer. We think, however, we have clouded their minds.' . . . Conscious, deliberate, oppressive, fraudulent conduct." RT8172:17-8174:3. *See also* RT2879:7-25, 8172:27-8173:6.

Allowing this irrelevant and inflammatory evidence and argument, particularly to the extent it was allowed here, was highly prejudicial error requiring a new trial.[3] Indeed, plaintiffs' invocation of the Bronco II as a basis for punitive dam-

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[3] Although some incidental references to the Bronco II might have been unavoidable because certain early Explorer design documents referenced the Bronco II as Ford's earlier 2-door SUV, that did not make evidence about the Bronco II relevant to whether the 1997 4-door Explorer is defective.

ages, in and of itself, is unconstitutional and grounds for reversal, because due process forbids imposing punitive damages against a defendant for conduct other than the specific conduct that harmed the plaintiffs before the court. *State Farm*, 538 U.S. at 423.[4]

* * * * *

3. The excluded evidence was highly relevant to rebut plaintiffs' Bronco II evidence and claim for punitive damages.

Plaintiffs were allowed to put on misleading evidence and argued at length to the jury that the *Bronco II*'s supposed "real world" rollover rate told Ford's engineers and "upper management" that their decisions regarding the Explorer were wrong. *E.g.*, RT1265:5-27, 8509:2-7. In both opening statement and closing argument, plaintiffs' counsel emphasized that the Bronco II supposedly had a "fatal rollover rate" that was three times as high as its closest competitors, including the Chevy Blazer. RT663:20-27; 8173:20-25. Plaintiffs claimed that Ford willfully disregarded the "what they knew" based on this comparative "fatal rollover rate." RT8171:4-8174:3.

But the court's rulings precluded Ford from proving that the Explorer's "fatal rollover rate"—which is based on the

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[4] The California Supreme Court's recent decision in *Johnson v. Ford Motor Co.* (2005) -- Cal.4th --, 29 Cal.Rptr.3d 401, confirms that a defendant may not be punished for conduct that did not harm the plaintiff (*see id.* at 413 fn.6), that only conduct similar to that which injured the particular plaintiff is even potentially relevant to the punitive damage analysis (*see id.* at 411), and that "in the context of civil actions courts must ensure the conduct in question *replicates* the prior transgressions." *Id.* (quoting *State Farm*, 538 U.S. at 423-24) (emphasis added).

same government database upon which plaintiffs relied to attack the Bronco II—compared very favorably to that of its closest competitors, and was nearly identical to that of the Blazer. In other words, plaintiffs were allowed to attack the *Explorer* with the "fatal rollover rate" of the *Bronco II* compared to other vehicles, but Ford was precluded from defending the Explorer with its *own* "fatal rollover rate" compared to other vehicles, including the very same vehicles plaintiffs used for comparison. It is difficult to imagine a more irrational, unfair, and prejudicial combination of evidentiary rulings.

Ford's safety record evidence was highly relevant to the punitive damage inquiry, which required the jury to evaluate whether Ford's conduct in choosing the Explorer design was "despicable" and "malicious" under California Civil Code section 3294 and whether Ford "willfully and consciously" disregarded a manifestly unreasonable risk of serious injury.[5] Given that all vehicles pose some degree of risk, including rollover risk, manufacturers must always make design decisions weighing risks and benefits. Indeed, plaintiffs argued that Ford's engineers *should have* considered *more closely* alleged statistical evidence of rollover rates in making their design decisions. RT1265:20-22, 1266:3-5, 1266:15-27.

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[5] In denying Ford's new trial motion, the court overlooked the punitive damages aspect of Ford's argument. *Compare* AA2055 (court's statement that "Ford advocates that evidence of the safety of other SUVs is necessary to show the safety of the Ford Explorer") *with* AA1062-1063 (Ford's argument that excluding this evidence was "highly prejudicial to the jury's evaluation of whether Ford's conduct in choosing the Explorer design was 'despicable' and 'malicious' within the meaning of California Civil Code section 3294").

As discussed above (*supra* Part I.A), even plaintiffs' evidence showed that Ford employees expected the Explorer to be safer than the Bronco II. But Ford was precluded from showing that the Explorer's actual safety record proved those Ford employees right and proved plaintiffs' assertion that the 1997 Explorer was a thinly-disguised Bronco II wrong.

This violated not only California law but the Due Process Clause, as it unjustifiably restricted Ford from defending itself against the threat of unprecedented punishment. *See State Farm*, 538 U.S. at 417-18. Had even *one* more juror voted for Ford, several of the liability and damages verdicts would have been different, and there would be no punitive award. The rulings are a clear and prejudicial abuse of discretion, violate due process, and must be reversed. *See Osborn*, 5 Cal.App.4th at 254-55.

II. As A Matter Of Law, Punitive Damages Cannot Be Imposed In This Case

* * * * *

As shown below, California law and basic due process principles require that judgment be entered for Ford on punitive damages.

* * * * *

B. If California Law Would Allow Punishment On This Record, Then The Law Is Unconstitutionally Vague As Applied

If Section 3294 would permit an award of punitive damages against Ford, then that statute is unconstitutionally vague as applied to this case.

As a matter of due process under the California and United States Constitutions, a quasi-criminal law is unconsti-

tutionally vague where either of two conditions is met.[6] "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *People v. Castaneda* (2000) 23 Cal.4th 743, 751 (quoting *City of Chicago v. Morales* (1999) 527 U.S. 41, 56); *accord, e.g., Hill v. Colorado* (2000) 530 U.S. 703, 732. "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Arthur Andersen LLP v. United States* (2005) 544 U.S.--, 125 S.Ct. 2129, 2134 (citation omitted). *See also State Farm*, 538 U.S. at 417; *Simon v. San Paolo U.S. Holding Co.* (2005) — Cal.4th —, 29 Cal.Rptr.3d 379, 392. Clarity is "particularly appropriate here, where the act underlying" the liability finding—manufacturing an automobile—"is by itself innocuous." *Arthur Andersen*, 125 S.Ct. at 2134. If California law allows punishment under the circumstances here, where reasonable people can and do disagree with the scientific reliability of plaintiffs' theory of defect, it is unconstitutional as applied, under both prongs of the vagueness doctrine.

1. As applied, Section 3294 failed to provide Ford a reasonable opportunity to know what conduct is punishable

"[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*

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6 Punitive damages are "quasi-criminal" and "operate as 'private fines' intended to punish the defendant and deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432.

v. City of Rockford (1972) 408 U.S. 104, 108; *accord Morales*, 527 U.S. at 56 (fair notice principle serves the purpose of "provid[ing] the kind of notice that will enable ordinary people to understand what conduct [a law] prohibits"). States may not enforce a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier* (1997) 520 U.S. 259, 266; *accord, e.g., Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 773-74 (same). This standard forbids punishment when people of common intelligence can differ on whether that conduct is unlawful.[7]

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[7] *See, e.g., United States v. Capital Traction Co.* (D.C. Cir. 1910) 34 App.D.C. 592; *Connally v. Gen. Constr. Co.* (1926) 269 U.S. 385, 391-95 (endorsing *Capital Traction*); *Southwestern Tel. & Tel. Co. v. Danaher* (1915) 238 U.S. 482, 490-91; *Colautti v. Franklin* (1979) 439 U.S. 379, 395-96; *People v. Mirmirani* (1981) 30 Cal.3d 375; *People v. Barksdale* (1972) 8 Cal.3d 320; *Hewitt v. State Bd. of Med. Exam'rs* (1906) 148 Cal. 590, 592-93 ("Taking a given advertisement by a physician, the members of one board might conclude that it contained 'grossly improbable statements,' while another board might reach an entirely opposite conclusion. One might conclude that the statement while 'improbable' was not 'grossly' so. the advertisement of a physician which one board had determined did not come within the inhibition of the rule according to its judgment, a succeeding board might conclude did."); *People v. North* (2003) 112 Cal.App.4th 621; *see also Lanier*, 520 U.S. 259 (noting qualified immunity test provides same protection as vagueness doctrine); *Anderson v. Creighton* (1987) 483 U.S. 635, 641 (cited in *Lanier*; officer entitled to argue for summary judgment on grounds that "he could, as a matter of law, reasonably have believed that [his conduct] was lawful").

If a manufacturer is subject to punishment for selling a product it has reasonable grounds to conclude is not defective, the only way that any manufacturer can avoid punishment is to cease producing products that might be subject to criticism by other reasonable people with differing views. This, in effect, means that manufacturers can avoid punishment only if they stop selling products, because all products can cause injury and litigation experts can be retained to criticize almost any aspect of a product that results in injury.

This case is a graphic illustration of this point. Other than the federal safety standards with which the Explorer indisputably complied, that is no objective legal measure of how resistant to rollover or roof crush a vehicle must be in order to be deemed "non-defective." Reasonable people can disagree on those issues. In the face of such inherent uncertainty, whether a particular design is defective, much less may subject Ford to punishment, can be known only by the after-the-fact determination of a particular jury. And different juries are likely to reach different conclusions. Such an imprecise standard is so vague that reasonable people "must necessarily guess at its meaning and differ as to its application." *Castaneda*, 23 Cal.4th at 751. If Section 3294 permits an award of punitive damages in this case, it is unconstitutionally vague as applied.

2. As applied, Section 3294 permits arbitrary and discriminatory enforcement

"[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108-09; *see also Giaccio v. Pa.* (1966) 382 U.S. 399, 403-04. That is because "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.*; *see also Morales*, 527 U.S. at 56; *Castaneda*, 23 Cal.4th at 751; *Kolender v. Law-*

son (1983) 461 U.S. 352, 357-58; *Gatto*, 98 Cal.App.4th 744; *People v. Superior Court* (1982) 31 Cal.3d 797; *Hewitt*, 148 Cal. at 594.

The danger of arbitrary and discriminatory enforcement is particularly acute in this case. First, Ford is a large, multinational corporation with neither its headquarters nor its principal place of business in California. "Punitive damages pose an acute danger of arbitrary deprivation of property," and "creat[e] the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor Co. v. Oberg* (1994) 512 U.S. 415, 432. Second, in the product liability context the test for determining whether a product is defectively designed is not clear but is instead fraught with ambiguities and uncertainty. The jury must consider "a list of *competing* considerations . . . to evaluate in determining the existence of a design defect" (*Anderson v. Owens-Corning Fiberglas Co.* (1991) 53 Cal.3d 987, 1001 (emphasis added)), and conducts this unguided "balancing" process "*through hindsight*." *Barker*, 20 Cal.3d at 430 (emphasis added). Given the inevitable, and often legitimate, differences of opinion regarding the proper mix of these and other conflicting goods, many product liability cases fall within a range of reasonable disagreement:

> There is therefore a vast defect "no man's land" where a manufacturer has no idea whether it is on the right or wrong side of the law. . . . The very notion of how much design safety is enough, and to a lesser extent how much safety information is enough, involves a morass of conceptual, political and practical issues on which juries, courts, commentators and legislatures strongly disagree.

David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products*, 49 U.CHI.L.REV. 1, 37 (1982).

Moreover, while there is no dispute that a risk-utility test is appropriate in many contexts, empirical evidence shows that many jurors are prejudiced against risk-utility balancing. Research shows juries are more likely to inflict punitive damages where a defendant has engaged in such a process during the design of a vehicle. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN.L.REV. 547, 550-51, 556, 589-90 (2000). But California law, by making risk-utility balancing part of its test for design defect, *requires* a manufacturer to engage in such balancing. *See Barker,* 20 Cal.3d at 432. If California law permits juries to award punitive damages based on their own "personal predilections" concerning risk-utility balancing, then California law is unconstitutionally vague. *Kolender*, 461 U.S. at 358.

III. Ford Is Entitled To A New Trial On All Issues, Or At The Very Least A Substantial Remittitur

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B. The Punitive Damages Award Is Excessive And The Product Of Improper Considerations -

The punitive damage award, even as remitted, violates due process and California law. This Court has an obligation to engage in "exacting" *de novo* review of the size of the punitive award to ensure it comports with due process. *State Farm*, 538 U.S. at 418; *see also Simon v. San Paolo U.S. Holding Co., Inc.* (2005) --Cal.4th--, 29 Cal.Rptr.3d 379, 387-88.

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2. The punitive damages award is excessive under *State Farm* and California law

Even if liability for punitive damages were not otherwise precluded, the ***$75,000,000*** punitive judgment would have to be set aside in its entirety as grossly excessive as a matter of California law and the Due Process Clause of the Fourteenth Amendment. This punishment—which began as an outrageous ***$246,000,000*** punitive damages verdict—further confirms that the jury was motivated by anger, passion, prejudice, and bias. The award here is simply off the charts. It is more than three times larger than the largest punitive damages award ever upheld in California in an automotive products liability case in a published opinion. *See Romo*, 113 Cal.App.4th 738 ($23,723,287 award where accident involved three deaths and three other seriously injured individuals). As of 1997, the year of plaintiffs' vehicle, the largest automobile products liability punitive damages award upheld in a published California decision was $4,000,000, or roughly ***1/19th*** of the punitive damages here. *See Hasson*, 32 Cal.3d 388. A new trial is the only way to cure this defect in the proceedings. *See Sabella*, 70 Cal.2d at 316 n.2; *Wells*, 793 F.2d at 683-84.

If the compensatory damages award is upheld, then the punitive damages award must be set aside because of the large, clearly punitive noneconomic damages award. "[L]arge compensatory damage awards . . . have a strong deterrent and punitive effect in themselves." *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th at 424 (Brown, J., concurring); *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1106 (same). Heaping punishment on top of punishment by allowing the separate punitive damages award to stand would be excessive and unconstitutional.

Moreover, if the compensatory damages award is reduced, then the punitive award must likewise be reduced to maintain a proper ratio. As the Supreme Court stated in *State*

Farm, where compensatory damages are large (and the Court deemed a $1 million compensatory award large), punitive damages should not exceed the compensatory award. *State Farm*, 538 U.S. at 424-28.

Either way, Ford is entitled to a new trial regarding punitive damages, or at the very least a substantial remittitur.

* * * * *

APPENDIX D

No. D045154

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BENETTA BUELL-WILSON and BARRY S. WILSON

Plaintiffs, Respondents, and Cross-Appellants,

v.

FORD MOTOR COMPANY and DREW FORD

Defendants, Appellants and Cross-Respondents.

On Appeal From The San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

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IV. PUNITIVE DAMAGES ARE, AS A MATTER OF LAW, PRECLUDED HERE

A. Punitive Damages Cannot Be Imposed Where Plaintiffs Proved, At Most, The Existence Of A Reasonable Disagreement Regarding The Explorer's Design.

As Ford demonstrated in its opening brief, it is a fundamental principle of California and American jurisprudence that, where a defendant has reasonable grounds for believing its conduct is lawful, it cannot be subjected to punitive damages, even if the evidence is sufficient for purposes of assessing compensatory liability. AOB58-60 (citing cases); *see also, e.g., Southwestern Tel. & Tel. Co. v. Danaher* (1915) 238 U.S. 482, 490 (holding that a $6,300 civil penalty violated due process where defendant had a good faith belief that its conduct was lawful). In response, plaintiffs do not really dispute this principle, but instead fall back on slogans, mischaracterizations and the assertion that there is only one right answer to the complex engineering questions posed to

the jury in this case. RB43-47.[1] But if the record makes one thing clear, it is that these issues have been the subject of genuine and vigorous dispute in the engineering community for decades, with plaintiffs' experts and others on one side of the debates and the federal Safety Administration, Ford and other auto manufacturers on the other.

Regardless of who an individual jury agrees with on these reasonably debatable issues, California law, due process, and common sense prohibit the use of punitive damages to punish Ford for its positions in these debates—indeed, a vital feature of science and engineering is the process of debate and disagreement that leads to technological advancement. *Daubert v. Merrell Dow Pharm., Inc.* (1993) 509 U.S. 579, 596-97 ("open debate is an essential part of . . . scientific analyses. . . . Scientific conclusions are subject to perpetual revision."). To hold otherwise would not only be unfair but it would discourage precisely the kind of free and open discussion that is essential to safety innovation and improvement.

Thus, to decide this issue, Ford is not asking this Court to decide who is correct or to override factual determinations made by the jury, as plaintiffs wrongly suggest. RB44-45. Instead, the issue presented is purely a legal one: were there grounds for reasonable disagreement regarding the lawful-

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[1] As Ford pointed out in its opening brief, it made an offer of proof in the trial court to show that 13 Explorer verdicts were rendered *in favor of Ford* before the jury's verdict here, including some that specifically rejected defect claims like those advanced here. Plaintiffs' professed indignation at Ford's reference to these verdicts (RB24) is especially misplaced in light of *plaintiffs'* heavy reliance on other cases—*none* of which involved the Explorer—that went against Ford. RB9, 20-21, 51.

ness of the conduct at issue in this case? The answer is clearly "Yes," and the punitive damage award therefore must be set aside as a matter of law.

* * * * *

V. THE PUNITIVE DAMAGE AWARD IS UNCONSTITUTIONALLY EXCESSIVE

* * * * *

A. The Punitive Damages Award Does Not Comply With Constitutional Guideposts.

Plaintiffs claim the punitive damages award was proper because Ford's conduct was "highly reprehensible" for five reasons: (1) it caused physical, not economic, harm; (2) it evinced an indifference to the safety of others; (3) its target was financially vulnerable; (4) it had a "pattern of deficient design regarding safety in favor of increased financial returns"; and (5) the harm was not accidental. RB53-54.

Plaintiffs ignore the proper standard of review. The United States Supreme Court has held that courts have a special obligation, as a matter of federal due process, to engage in "[e]xacting" *de novo* review of punitive damages awards, *see, e.g.*, *State Farm*, 538 U.S. at 418, which requires courts to, among other things, "mak[e] an independent assessment of the reprehensibility of the defendant's conduct" without deference to any "implied" "findings" by the jury. *Simon v. San Paolo U.S. Holdings, Co., Inc.* (2004) 35 Cal.4th 1159, 1172-73 (due process precludes deference to anything other than jury's *express* factual findings). Not only did the jury here not make specific factual findings on the malice point, but it split 9-3 on punitive liability—underscoring the fact that Ford's conduct was far from the sort of clearly reprehensible behavior that warrants substantial punishment.

The five factors plaintiffs invoke are derived from *State Farm*, but this Court's review must eschew plaintiffs' mechanical application, and instead use these and other factors

to situate the conduct at issue within a rational spectrum of behavior all of which is in some sense "reprehensible" enough to warrant *some* punitive damages. A proper analysis necessarily recognizes that *every* product liability case will involve physical injury and some conduct that can be characterized as "indifference" to safety. Indeed, virtually *all* product manufacturers to some degree must "know" or "expect" that their products will cause injury—even serious injury—but not every product liability case falls at the high end of the spectrum. *See* AOB74, 78-79; *see also, e.g., Corrosion Proof Fittings v. E.P.A.* (5th Cir. 1991) 947 F.2d 1201, 1223 n.23 ("over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*") (original emphasis).

Thus, plaintiffs' first factor is not determinative here because product liability cases always involve physical, not merely economic, harm. With regard to the second factor, as discussed in detail above, Ford's good faith belief that its conduct was lawful was based on, among other things, its compliance with federal safety standards and industry custom, and significantly lessens any reprehensibility. *See BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 565, 570-71, 577-78 (defendant's reliance on other state statutes authorizing the conduct at issue was reasonable and substantially mitigated reprehensibility).

With regard to the third factor, plaintiffs do not point to any evidence they were particularly financially vulnerable, or that this contributed to their injuries. Their suggestion that Ford's superior knowledge regarding "design" somehow translates to targeting "financially vulnerable" consumers is nonsensical. *See* RB53. *State Farm*, which involved an insurance bad faith case, makes clear this factor is meant to address circumstances such as fraudulent schemes in which the defendant intentionally preys on the poor or the harm inflicted is directed to the targets' financial helplessness. 538 U.S. at 419 ("State Farm amplified the harm by at first assur-

ing the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house.").

With regard to the fourth factor, plaintiffs invoke their slogan that Ford "put profits ahead of safety" based on its alleged conduct first in the design of the Bronco II and then the Explorer. *See* RB53 (citing RB, section II(D)). But not only is there no substantial evidence of this, it is doubly improper to impose punitive damages here based on any alleged conduct in connection with the Bronco II, which never injured plaintiffs.

Finally, regarding the fifth factor, there is no evidence—and it defies common sense to claim—Ford intended to harm plaintiffs. Plaintiffs' claim that Ford made "deliberate decisions" that harmed plaintiffs relies on the same distortions discussed in Section IV(D), *supra*.

* * * * *

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No. 06-1068

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal

BRIEF FOR THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief addresses the following question presented by the Petition:

Whether the California punitive damages statute deprives defendants of fair notice, and thus violates due process, when applied to permit the imposition of punitive damages without regard to objective indicators of reasonableness, such as industry custom, governmental safety standards, and the existence of a genuine debate in the engineering community.

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OTHER AUTHORITIES

American Law of Products Liability (Timothy E. Travers et al. eds., 3d ed. 1997) 10

Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993) 18

Andrew C. Clausen & Annette M. Carwie, *Problems Applying the* Life of Georgia v. Johnson *Case in the Liability Setting: Where Do We Go With Punitive Damages After* BMW v. Gore*?*, 58 Ala. Law. 46 (1997) 18

CR's Focus on Safety, Consumer Reports, Apr. 2003, at 29 15

W. Page Keeton, *Prosser & Keeton on the Law of Torts* (5th ed. 1984) 13

David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1 (1982) 19

A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998) 20

Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071 (1998) 20

W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. 107 (2001) 17

W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547 (2000) 19

BRIEF AMICI CURIAE OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

The Alliance of Automobile Manufacturers, Inc. ("the Alliance") and the National Association of Manufacturers ("the NAM") respectfully submit this brief amici curiae in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICI CURIAE

The Alliance is a nonprofit trade association formed in 1999 and incorporated in Delaware. The Alliance has nine members: BMW Group; DaimlerChrysler Corporation; Ford Motor Company ("Ford"); General Motors Corporation; Mazda North American Operations; Mitsubishi Motors North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc.; and Volkswagen of America, Inc. The Alliance's members account for more than 80% of motor vehicle sales in the United States.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The Alliance and the NAM often file amicus briefs in cases – like this one – that are of great interest and conse-

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel contributed monetarily to the brief.

quence to the automobile industry and manufacturers more generally. They are filing this brief to address only the first question presented by the Petition, which concerns the fair notice required before a jury may impose any punitive damages against a defendant.

The Alliance and the NAM are concerned about the effects of skyrocketing punitive damages awards on product manufacturers. For example, accidents involving automobiles often result in serious injury or death, even when the automobile manufacturer has complied with all applicable safety statutes and regulations and the automobile includes the latest and best safety features. In manufacturing an automobile – or any product, for that matter – a manufacturer must necessarily make tradeoffs between product performance and safety, taking into account engineering limitations. Under many state products liability laws, juries are permitted to hold a manufacturer strictly liable based on *post hoc* findings that the manufacturer chose wrong in making those tradeoffs, *i.e.*, that, in the jury's view, the risks of the product outweigh its benefits. And, on top of compensatory liability, juries often award massive punitive damages when they believe the manufacturer chose wrong, even when the manufacturer's good-faith design choice was consistent with industry standards and federal regulations and therefore objectively reasonable. As a result, manufacturers simply have no way of knowing whether their reasonable design decisions may years later be subject to punishment.

The Alliance and the NAM believe that this Court's intervention is necessary to ensure that manufacturers are not punished in the absence of fair notice that their conduct was unlawful. The decision below allows punishment where reasonable people could disagree about what the law permits, and that result is inconsistent with due process.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY TO ADDRESS THE FAIR NOTICE REQUIRED BY DUE PROCESS BEFORE PUNITIVE DAMAGES MAY BE IMPOSED

This Court should grant the petition to address the important issue of whether state laws permitting the imposition of punitive damages without regard to objective indicators of reasonable conduct provide the fair notice required by the Due Process Clause. As a matter of procedural due process, a person may not be subjected to any punishment – including punitive damages – unless he has been given notice sufficient to allow a "person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). If reasonable people could disagree about whether conduct violates a statute, then the statute may not be a basis for punishment, because any punishment would be wholly arbitrary. This principle is fundamental, and it was recently reaffirmed in *Philip Morris USA v. Williams*, where the Court repeatedly noted its "concern for adequate notice" in the punitive damages context. 127 S. Ct. 1057, 1064 (2007); *see also id.* at 1062, 1063.

The California Court of Appeal's application of the State's punitive damages statute was contrary to that importance notice principle. California law allows punitive damages to be awarded upon a showing of "malice," and the plaintiffs here argued that Ford acted with malice in choosing a particular design for the Ford Explorer. Ford noted that there were several objective factors relevant to whether punitive damages were proper, including its conformity with industry customs, compliance with stringent federal regulations, and the fact that the design resulted from a good-faith debate among engineers during the design process. Those factors showed that reasonable people can disagree about the appropriateness of the design choices Ford made, and thus

Ford could not have known that its conduct could be subject to punitive damages. Yet the Court of Appeal decided that those objective indicators were "irrelevant" to the question of whether punitive damages were permissible, Pet. App. 23a, and it approved a $55 million award of punitive damages without ensuring that Ford had fair notice and an opportunity to conform its conduct to the law. The decision below is contrary to this Court's precedents and to the decisions of several state and federal courts.

The fair notice issue raised in this case is important. Although this Court has addressed the notice required of the *severity* of a punitive damages penalty, it has not addressed the notice required before certain conduct can be subject to punishment as a threshold matter. The latter question arises with great frequency in products liability cases, especially those involving motor vehicles, where punitive damages verdicts continue to skyrocket. *See, e.g.*, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part).

Indeed, in products liability cases, juries routinely award punitive damages based not on a manufacturer's malicious intent to harm consumers but instead on their own second-guessing of good-faith design decisions made years or decades ago. Juries often use a manufacturer's balancing of the cost of design alternatives with risks to consumers as a basis for punitive damages, even though that balancing occurs in the development of *every* product and *any* product could arguably be made "more safe." Without use of objective factors to guide the jury's consideration of whether the manufacturer acted with the requisite reprehensibility, juries will be left with standardless discretion to award punitive damages in products liability cases. This Court should grant review and hold that punitive damages have no place where reasonable people could disagree about whether a defendant's conduct was unlawful.

A. The Due Process Clause Requires That A Defendant Be Afforded Fair Notice Before Being Subjected To Punitive Damages

1. It is a fundamental principle of due process that a person may not be punished for certain conduct without having received fair notice that engaging in that conduct may subject him to punishment. A punishment imposed without fair notice is inherently arbitrary, and due process "prohibits the imposition of . . . arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). "Indeed, the point of due process – of the law in general – is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (O'Connor, J., dissenting). Not only does fair notice ensure that a punishment is not arbitrary, but "it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

In terms of what constitutes "fair notice" that certain conduct may be subject to punishment, this Court has recognized that a statute authorizing punishment is so vague that it violates due process when it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. "Vague laws may trap the innocent by not providing fair warning." *Id.* A defendant may not be punished, then, based on a "statute which either forbids or requires the doing of an act in terms so

vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

The requirement of fair notice applies equally to both criminal and civil penalties. *See Gore*, 517 U.S. at 574 n.22. This Court has repeatedly invoked the principle to invalidate civil statutory penalties. *See, e.g., Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 241-43 (1932); *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 238-42 (1925); *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915).

Punitive damages are one type of civil penalty for which fair notice is particularly important. This Court has explained that there are both "procedural and substantive constitutional limitations" on punitive damages awards. *State Farm*, 538 U.S. at 416. As a procedural matter, "elementary notions of fairness enshrined in our constitutional jurisprudence dictate" that a defendant receive fair notice *both* "of the conduct that will subject him to punishment" *and* "the severity of the penalty that a State may impose." *Id.* (internal quotation marks omitted). While this Court has addressed the failure to provide fair notice of the severity of a punishment, the right to fair notice of the conduct that can give rise to punishment has an even longer pedigree. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 105-06 (4th Cir. 1991).

Punitive damages pose a particularly "acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). They are "quasi-criminal" penalties that "operate as private fines intended to punish the defendant and to deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (internal quotation marks omitted). As quasi-criminal penalties, punitive damages awards are subject to a vagueness standard stricter than that which governs in most other

civil and administrative contexts. *See Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982).

2. This Court has applied the due process requirement of fair notice to prohibit punishment in a variety of cases where reasonable people acting in good faith could disagree on whether the defendant's conduct was lawful.

For example, in *Southwestern Telegraph & Telephone Co. v. Danaher*, the Court considered whether a state statute authorizing civil penalties of $100 per day for discriminating against telephone customers was unconstitutionally vague. 238 U.S. at 485. The statute required telephone companies to "supply all applicants for telephone connection and facilities without discrimination or partiality" so long as the applicants complied with the company's "reasonable regulations." *Id.* (quoting Ark. Stat. § 7948). At issue was a telephone regulation stating that the company would not furnish telephone service to a customer in arrears. *Id.* at 486. The Court held that penalties could not be imposed based on a *post hoc* finding that the regulation was unreasonable, explaining that the regulation had been "adopted in good faith, had been uniformly and impartially enforced for many years"; there was "no decision in the State holding or indicating that it was unreasonable" and the statute "left that matter entirely open"; and "[l]ike regulations often had been pronounced reasonable and valid in other jurisdictions." *Id.* at 489. Under those circumstances, the penalties assessed were "so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." *Id.* at 491.

Similarly, in *Connally v. General Construction Co.*, this Court invalidated a statute authorizing penalties for employers that failed to pay employees at least "the current rate of per diem wages in the locality." 269 U.S. 385, 388 (1926) (quoting Comp. Okla. Stat. § 7255). The Court noted that the statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them

liable." *Id.* at 391. Because both the terms "current rate of per diem wages" and "locality" were undefined, the Court found that "men of common intelligence must necessarily guess" as to their meaning and the ultimate "application of the law" would depend "upon the probably varying impressions of juries," rendering the statute unconstitutionally vague. *Id.* at 391, 395.

Further, in *Giaccio v. Pennsylvania*, the Court struck down a state statute allowing a jury to require an acquitted misdemeanor defendant to pay the costs of his trial. 382 U.S. at 400, 402. The Court found that the statute allowing assessment of costs on a defendant "contain[ed] no standards at all," nor did it "place any conditions of any kind upon the jury's power to impose costs." *Id.* at 402-03. The result was that "[i]t would be difficult if not impossible for a person to prepare a defense" to an assessment of costs and "judges and jurors" would be "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Id.* at 403-04. The statute as applied was thus "void for vagueness." *Id.*

Numerous other decisions of this Court have reaffirmed that a statute is unconstitutionally vague if applied to punish certain conduct without notice sufficient to inform a reasonable person that the conduct is impermissible. *See, e.g., Morales,* 527 U.S. at 56-60 (ordinance prohibiting "loitering" was void for vagueness because it "fails to give the ordinary citizen adequate notice of what is forbidden"); *Champlin Ref. Co.*, 286 U.S. at 241-43 (penalties for "the production of crude oil or petroleum . . . in such a manner . . . as to constitute waste" was unconstitutionally vague because "waste" "necessarily depends upon many factors subject to frequent changes"); *A.B. Small Co.*, 267 U.S. at 238-42 (statute making it unlawful "to make any unjust or unreasonable . . . charge" or "exact excessive prices" for "necessaries" invalid because it "contained no provision pointing to what

should be deemed a just, reasonable and not excessive price"); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-92 (1921) (statute imposing penalties for "any unjust or unreasonable rate or charge" for "necessaries" was unconstitutionally vague because it "forb[ade] no specific or definite act"). This Court has again and again recognized that no punishment is allowed where people "can – and do – disagree" on what conduct the law prohibits. *Colautti v. Franklin*, 439 U.S. 379, 401 (1979).

B. The Court Of Appeal Improperly Approved Punitive Damages Even Though Ford Lacked Fair Notice

The California Court of Appeal's affirmance of a $55 million punitive damages award in this case violates due process because Ford did not have fair notice that its conduct could result in punitive damages. Extremely relevant to the question of fair notice are Ford's compliance with federal regulations, its conformity with industry standards, and the existence of a genuine debate in the engineering community about the design tradeoffs at issue here. Those objective indicators demonstrate that reasonable people could disagree about the design choices Ford made and that Ford had a significant basis for believing its design was reasonable. Yet the Court of Appeal deemed those factors completely irrelevant, subjecting Ford to an enormous punitive damages verdict based simply on one jury's subjective belief that Ford should have made the Explorer more safe.

1. California law allows imposition of strict products liability based on a "risk-utility" theory, where a product is deemed defective if a jury determines that its risks outweigh its benefits. *See, e.g., Barker v. Lull Eng'g Co.*, 573 P.2d 443, 446 (Cal. 1978). Specifically, once a plaintiff demonstrates that a product caused her injuries, the burden shifts to the defendant to show that the benefits of the product as designed outweigh its risks. *Id.* at 455. The jury must determine whether the product is defective based on "such com-

peting design considerations as risk, benefit, feasibility, and cost." *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 311 (Cal. 1994).[2] California law is typical. "[M]ost jurisdictions resolve the issue of whether the product is defective by applying some form of risk-utility analysis." *American Law of Products Liability* § 28:17 (Timothy E. Travers et al. eds., 3d ed. 1997). At the same time, that theory is inherently unpredictable, because it depends upon a single jury's after-the-fact determination as to whether a product is sufficiently safe. This case proves the point: Prior to this jury's verdict, judgment had been rendered in favor of Ford in eleven other cases. *See* Appellant's Appendix ("AA") 1154-1235.

Under California law, a plaintiff may recover punitive damages when she "prove[s] by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Cal. Civ. Code § 3294(a). As pertinent here, California law defines "malice" as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." *Id.* § 3294(c)(1).

2. As applied by the Court of Appeal, the California statute authorizing punitive damages violates due process. Without reference to objective standards, the statute is so vague that manufacturers simply cannot know what conduct a jury might later decide warrants punishment.[3]

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[2] California law also recognizes another approach to evaluating alleged design defects – the consumer expectation approach. *See id.* at 882. Contributing to the vagueness problem here, this case was actually tried under both theories, but on the last day of trial plaintiffs abandoned the consumer expectation theory and the case went to the jury only on the risk-utility theory. *See* AA 8119-20.

[3] *Amici* do not suggest that the California punitive damages statute is unconstitutionally vague on its face, because there plainly is a "core of proscribed conduct" to which the statute can constitutionally be applied.

In affirming the punitive damages verdict here, the Court of Appeal set aside all objective indicators upon which reasonable people would rely. The court rejected the argument that compliance with "all applicable governmental regulatory standards" bars punitive damages, on the ground that "[g]overnmental safety standards . . . have failed to provide adequate consumer protection against the manufacture and distribution of defective products." Pet. App. 46a-49a (internal quotation marks omitted). And the court held that, as a matter of California law, "compliance with industry standards or custom [i]s *irrelevant* . . . to punitive damages." *Id.* at 23a (emphasis added). Finally, the court rejected Ford's contention that "a 'reasonable disagreement' among experts concerning the propriety of its design decisions cannot . . . be subject to punitive damages" because "there [wa]s substantial evidence that Ford decision makers knew how to make the Explorer less dangerous, but chose not to do so because of financial considerations." *Id.* at 43a-44a, 50a. Thus, the Court of Appeal – like the jury – rested its decision on its subjective disagreement with Ford's cost/benefit balancing, notwithstanding the objective indicators from which Ford could conclude that its balancing was reasonable.

The Court of Appeal's application of California punitive damages law violates due process because it deprived Ford of fair notice sufficient to allow it to design its products to avoid punishment. As explained below, ample objective indicators showed that people of "common intelligence" could "differ" as to whether the Explorer's design was reasonable. *Lanier*, 520 U.S. at 266 (internal quotation marks omitted). And even if Ford's conduct could be deemed an unreasonable balancing of risks and benefits, punitive damages re-

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Harris County v. Carmax Auto Superstores Inc., 177 F.3d 306, 325 (5th Cir. 1999).

quire *malice*, *i.e.*, a "willful and conscious disregard" for safety. Cal. Civ. Code § 3294(c)(1).[4]

3. The facts of this case highlight how the Court of Appeal's approach conflicts with this Court's teachings on fair notice and several courts' specific holdings that objective indicators of reasonableness are extremely relevant to the appropriateness of punitive damages.

At issue in this case were two alleged design defects, relating to the strength of the Ford Explorer's roof and the alleged tendency of the vehicle to roll over. The plaintiffs argued that Ford acted with "malice" in designing the Ford Explorer because "Ford had the technology to make the Explorer stable and to strengthen the roof to protect the occupant, but did not use it." Reporter's Transcript ("RT") 2047-55, 2070-81, 3557-58. Ford demonstrated that its designs complied with extensive federal regulations, conformed with industry standards, and were the subject of genuine debates in the engineering community about how to best balance performance and safety. Those objective indicators show that reasonable people could differ concerning whether the benefits of the designs outweighed their risks, and that Ford had ample basis (including the support of the automobile industry and the federal government) for concluding that its designs were reasonable. In light of those facts, Ford cannot constitutionally be punished here.

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[4] Under the "malice" standard for awarding punitive damages, a manufacturer could not have fair notice that its design decision was subject to punishment unless the court concludes that the risk-utility analysis weighs so strongly against the manufacturer so as to merit, or nearly merit, a directed verdict on liability. *See, e.g.*, *Blue Cross & Blue Shield of Miss. v. Campbell*, 466 So. 2d 833, 843 (Miss. 1985) (holding that, in the "vast majority" of cases, "unless the trial judge grants a directed verdict to the insured plaintiff on the contract claim, then, as a matter of law, the insurance carrier has shown reasonably arguable basis to deny the claim; and, therefore, the carrier should never be subjected to the possibility of punitive damages based upon 'bad faith'").

a. First, a manufacturer's compliance with the strictest applicable statutory or regulatory safety requirements should preclude punitive damages. This Court has recognized the relevance of compliance with regulatory standards in assessing the appropriateness of punitive damages. For example, in *Gore*, the Court noted that "BMW could reasonably rely on state disclosure statutes for guidance" in determining "the appropriate line between presumptively minor damage [to automobiles] and damage requiring disclosure to purchasers." 517 U.S. at 579. Not surprisingly, numerous other courts have recognized that compliance with state or federal regulatory schemes makes punitive damages inappropriate. *See, e.g., Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (evidence insufficient to support finding of "wanton" conduct in light of defendant's compliance with federal standards); *Welch v. Gen. Motors Corp.*, 949 F. Supp. 843, 845 (N.D. Ga. 1996) (rejecting punitive damages claim because defendant complied with federal regulations); *Boyette v. L.W. Looney & Son*, 932 F. Supp. 1344, 1348 (D. Utah 1996) (dismissing punitive damages claim where defendant complied with federal regulations); *see also Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (no punitive damages where "no government or agency thereof ha[d] ever required" the design modification urged by plaintiffs). Commentators agree that "[i]n most contexts . . . compliance with a statutory standard should bar liability for punitive damages." W. Page Keeton, *Prosser & Keeton on the Law of Torts* 233 n.41 (5th ed. 1984).

In this case, Ford demonstrated that the Ford Explorer complied with all applicable warning and safety standards promulgated by the National Highway Transportation Safety Administration ("NHTSA"), the expert agency charged with automotive safety. But the Court of Appeal completely disregarded as irrelevant the fact that the Explorer met or exceeded Federal Motor Vehicle Safety Standard 216, which establishes requirements for vehicle roof-crush resistance.

See Pet. App. 13a, 49a; RT 2403; *see also* 49 C.F.R. § 571.216. The court similarly ignored the fact that NHTSA has refused to find SUVs defective as a class because of their tendency to roll over, and NHTSA twice declined to find that the Bronco II, the precursor to the Explorer, was defective. *See* 64 Fed. Reg. 27,343 (May 19, 1999). And it also ignored the fact that the Explorer passed the tests that NHTSA recognizes as "the most objective tests of the susceptibility of vehicles to maneuver-induced on-road rollover," 68 Fed. Reg. 59,250, 59,251-52 (Oct. 14, 2003), and that the Explorer displayed the prominent warning label required by NHTSA to alert consumers of the potential of vehicle rollover. *See* 49 Fed. Reg. 20,016 (May 11, 1984).

Plaintiffs' only answer is that NHTSA was wrong and that its safety standards should have been more stringent. While that argument might be relevant to whether Ford should be liable for compensatory damages, it cannot justify punitive damages. Indeed, it proves Ford's point – Ford could not have known that it would be punished for its design because it complied with federal regulations and guidelines. Lacking clear, uniformly applied standards for punitive liability, juries in individual cases should not be allowed to trump federal safety standards and mete out punishment to manufacturers whose decisions were consistent with the most stringent regulations of an expert federal agency.

b. Second, Ford's compliance with industry standards further demonstrates that punishment is inappropriate. Numerous courts have recognized that punitive damages cannot be justified under the amorphous "malice" standard applied here and in numerous other cases when a manufacturer's product comports with then-current industry standards. *See, e.g.*, *Satcher*, 52 F.3d at 1316-17 (no punitive damages where "the industry as a whole categorically reject[ed]" alternative design); *Drabik v. Stanley-Bostitch*, 997 F.2d 496, 510 (8th Cir. 1993) ("Compliance with industry standard and

custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind with no knowledge of a dangerous design defect."); *Nigro v. Remington Arms Co.*, 637 A.2d 983, 989-90 (Pa. Super. Ct. 1993) ("Compliance with industry standard and custom tends to . . . negate an inference of wanton indifference to the rights of others.").

Here, plaintiffs' Ford Explorer had "one of the best rollover rates compared to other SUVs in its class." Pet. App. 20a. The Explorer complied with five real-world vehicle stability tests commonly used by automobile manufacturers. RT 3635-36, 3657. For ten consecutive years, Consumer's Union awarded the Explorer a "recommended" rating for safety based on independent testing, RT 3232; AA 412, even though it awarded other SUVs "poor" or "unacceptable" ratings. *See, e.g., CR's Focus on Safety*, Consumer Reports, Apr. 2003, at 29. Those test results reflect the soundness of the Ford engineers' judgment and strongly suggest that Ford had no basis to know that its design could be deemed not only defective but *maliciously* defective.

c. Third, a good-faith debate over the best way to balance costs and benefits of a design empirically demonstrates that reasonable people could disagree over whether a manufacturer's conduct in designing a product was lawful. Many state and federal courts have recognized that a genuine engineering debate precludes punitive damages. *See, e.g., Satcher*, 52 F.3d at 1316-17 (no punitive damages where "there is a genuine dispute in the scientific community as to whether leg guards do more harm than good"); *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (punitive damages inappropriate where "reasonable disagreement" exists concerning the product); *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (reversing punitive damages award where there was a "good faith dispute" not rising to the level of "reckless indifference").

Here, the record sets forth the extensive good-faith efforts Ford engineers devoted to safety issues when designing the Explorer. Ford engineers sought to constantly improve the Explorer. For example, the Explorer was based the Bronco II ("BII"), but Ford engineers designed the Explorer "using a handling philosophy notably different from the BII," AA 2483-88, which ultimately resulted in the Explorer's demonstrably superior performance in the Consumer Union "accident avoidance" test. Ford also adopted several design changes to further enhance the safety of the Explorer even after it passed all of Ford's internal safety tests and the stability tests independently conducted by NHTSA. AA 2502. In making each of those design decisions, Ford balanced an incremental safety advantage – over and above the safety levels approved by NHTSA and validated by both Ford and independent testing – with tradeoffs in cost and in features consumers find desirable.

Plaintiffs argued that Ford's choice not to implement two additional design changes warrants punitive damages. But the fact that engineers debated those design changes and came to opposite conclusions shows that Ford was engaging in precisely the type of "line-drawing," *Gore*, 517 U.S. at 579, that a manufacturer must make all the time in choosing among competing designs. And in this particular debate, Ford's engineers were joined by the federal government and the rest of the domestic automobile industry. The fact that there was a debate in the engineering and regulatory community over the proper stability or roof-strength standards for utility vehicles, such as the Explorer, points strongly against any award of punitive damages.

C. This Court Should Grant Review Because Of The Importance Of Fair Notice In Stopping Runaway Punitive Damages Awards

Punitive damages in products liability cases continue to become more and more common, and the question of the

relevance of objective indicators will continue to recur. Under the Court of Appeal's approach, juries will be allowed almost standardless discretion, and manufacturers will be penalized for responsible corporate behavior. The time has come for this Court to step in.

1. Punitive damages awards have become commonplace in products liability cases. "The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990). Juries are often faced with sympathetic, severely injured plaintiffs and told that their injuries could have been prevented if only the manufacturer had just spent more money. And juries are often urged to award large punitive damages through explicit references to a defendant's massive wealth and lack of a local presence. *See Oberg*, 512 U.S. at 432 (noting that "the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences"). As a result, the "frequency and size" of punitive damages awards continues to "skyrocket[]." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting); *see also* Pet. 19 n.6 (collecting cases).

2. The Court of Appeal's approach will exacerbate this trend by allowing the imposition of punitive damages in essentially any case where the jury finds that a product is defective. The jury will not be constrained by objective indicators of reasonableness; all it need do is make a *post hoc* determination that the manufacturer should have done something more. *See* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. 107, 116 (2001) (noting the risk that a company's "superior *ex ante* risk judgments may be outweighed by the *ex post* reality of the accident victim").

The unavoidable reality is that manufacturers are *always* aware that their design choices will be subject to criticism because their products could have been made even safer. Products – particularly those that are designed to transport people at high speeds – can and do cause serious injury and death. That unfortunate mathematical certainty, however, applies to every vehicle sold in this country, as well as to countless other products. Indeed, "over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*." *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991). Some risks are unavoidable, and others are accepted because consumers are unwilling to accept the tradeoffs required for their reduction. *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 13-14 (1993).

It is thus no overstatement to say that, in every products liability case, a plaintiff will be able to offer "proof" that some alternative design, identified years or decades after the fact, would have made the product safer. As one commentator has observed, "[r]egardless of how high the manufacturer sets the design safety standard, when an accident does occur, the plaintiff's lawyer will have an expert to testify the product could have been made safer, and the injury prevented, if the manufacturer had just been willing to spend some additional money." Andrew C. Clausen & Annette M. Carwie, *Problems Applying the* Life of Georgia v. Johnson *Case in the Liability Setting: Where Do We Go With Punitive Damages After* BMW v. Gore*?*, 58 Ala. Law. 46, 48 (1997). The malice standard will thus be rendered toothless, and there will be no gatekeeper for punitive damages awards.

3. The unconstrained jury discretion afforded by the Court of Appeal's approach will lead to arbitrary results. As one of the leading scholars on punitive damages has observed, "[t]he very notion of how much design safety is enough . . . involves a morass of conceptual, political, and

practical issues on which juries, courts, commentators, and legislatures strongly disagree." David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 37-38 (1982). Varying impressions of juries on the safety issues involved in this case is not a mere probability; it is a fact, with numerous defense verdicts having been returned in Explorer cases both before and after the verdict in this case. Jurors will be allowed to effectively thwart federal regulations, even though those regulations were "adopted with studied care" by expert agencies, often in areas "where the difficulty of defining defectiveness (the 'proper' mix of safety and its tradeoffs) are especially great." Owen, *supra*, at 41-42. Without the constraint of objective standards, there is a significant threat that juries will award punitive damages based on their own "personal predilections" concerning risk-utility balancing. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (internal quotation marks omitted). This is the precise result procedural due process is meant to prevent.

4. Moreover, a system in which juries are permitted to award punitive damages based solely on subjective risk-utility balancing creates perverse incentives. Empirical evidence shows that many jurors are willing to inflict punitive damages simply because a defendant has engaged in risk-utility balancing. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 550-51, 556, 589-90 (2000). This has the effect of punishing defendants that have thoroughly debated the risks and benefits of various product designs. *Id.* at 550, 558. Although that is what responsible manufacturers do *ex ante*, *ex post* it is a "red flag[]" demonstrating a "callous disregard for human health." *Id.* at 578.

Further, if a manufacturer is subject to punishment where reasonable people can conclude that the product is reasonably safe, there is only one way for a manufacture to order its affairs to avoid punishment: Stop selling any product that

can cause injuries and that some jury *may*, years or even decades later, find could have been made more safe. "[A] firm might be induced to withdraw its product from the marketplace even though consumers place a higher value on the product than its full cost of production, which includes the average harm caused by the product." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882 (1998). And for those manufacturers that choose to continue making their products, the specter of punitive damages is likely to chill innovation and "produce excessive caution in risk-averse managers and companies." Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2077 & nn.22-23 (1998).

* * *

This Court recently warned that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system . . . may threaten arbitrary punishments, *i.e.*, punishments that reflect not an application of law but a decisionmaker's caprice." *Williams*, 127 S. Ct. at 1062 (internal quotation marks and citation omitted). This case addresses that precise risk. The Court of Appeal's approach unmoors punitive damages from any objective bases for punishment and leads almost inexorably to arbitrary punishments. This Court should grant review to ensure that defendants are given fair notice before any punitive damages may be imposed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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Pursuant to this Court's Rule 37.2, *amicus curiae* respectfully files this brief in support of the petition for certiorari.*

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the Nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and geographic region of the country. One of the Chamber's most important functions is to represent its members' interests by filing *amicus curiae* briefs in cases involving issues of concern to American business.

There are few issues of greater concern to American business than arbitrary punitive damages awards. For this reason, the Chamber has filed *amicus curiae* briefs in all of the leading punitive damages cases in this Court, including *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). For the reasons stated below, the Chamber believes that the issues presented in this case also warrant review.

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* Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amicus curiae*, and their consent letters are on file with the Clerk's Office.

REASON FOR GRANTING THE WRIT

The California Court of Appeal Erred, And Destabilized The Law, By Holding That Compliance With Federal Safety Standards Is Irrelevant To Determining Whether Punitive Damages Are Warranted.

Petitioner Ford Motor Company presents three constitutional questions relating to the award of $55 million in punitive damages in this case. *See* Pet. i. *Amicus* here addresses only the first of those questions, and specifically focuses on whether the Federal Constitution allows the imposition of punitive damages in *any* amount based on conduct that complies with relevant government and industry standards.

The answer to that question is presumptively no. This Court has made it clear that the Due Process Clause protects against arbitrary punishment, including the arbitrary imposition of the quasi-criminal (and explicitly extra-compensatory) penalty of punitive damages. *See, e.g., Philip Morris*, 127 S. Ct. at 1062; *State Farm*, 538 U.S. at 416-17; *Gore*, 517 U.S. at 559. It is nothing if not arbitrary for the law to impose punishment based on conduct that a reasonable person would not believe is subject to punishment.

The guiding principle here is simple: a person is entitled to fair notice of conduct subject to punishment. *See, e.g., Philip Morris*, 127 S. Ct. at 1062; *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-04 (1966). In the absence of such notice, a person has no way to steer clear of punishment. As this Court has explained, "the point of due process ... is to allow citizens to order their behavior." *State Farm*, 538 U.S. at 418 (internal quotation omitted). Where citizens abide by objective guideposts of reasonable behavior, it is at least presumptively arbitrary for the law to punish them. "A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias

or whim." *Id.* at 418 (internal quotation omitted); *see also id.* at 417 ("[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to punishment.") (internal quotation omitted).

Government and industry safety standards provide precisely such objective guideposts of reasonable behavior. It follows, as many courts and commentators have recognized, that compliance with such guideposts presumptively negates the requisite culpability for punitive damages. *See, e.g., Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (applying Mississippi law); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1058 n.20 (11th Cir. 1994) (applying Alabama law); *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) (applying Missouri law); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (applying Colorado law); *Boyette v. L.W. Looney & Son, Inc.*, 932 F. Supp. 1344, 1347-48 (D. Utah 1996) (applying Utah law); *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699, 703 n.8 (D. Md. 1993) (applying Maryland law); *Miles v. Ford Motor Co.*, 922 S.W.2d 572, 589-90 & n.7 (Tex. Ct. App. 1996), *aff'd in part, rev'd in part on other grounds*, 967 S.W.2d 377 (Tex. 1998); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993); *American Cyanamid Co. v. Roy*, 498 So. 2d 859, 862-63 (Fla. 1986); W. Page Keeton *et al.*, *Prosser & Keeton on The Law of Torts* § 36, at 233 n.41 (5th ed. 1984) (compliance with a safety standard should presumptively bar punitive damages); Paul Dueffert, Note, *The Role of Regulatory Compliance in Tort Actions*, 26 Harv. J. Legis. 175, 200 (1989) (same); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 41-42 & n.196 (1982) (same). Were the law otherwise, persons would lack constitutionally adequate notice that their conduct was subject to punishment, and any ability to "order their behavior" to avoid punishment. *State Farm*, 538 U.S. at 418 (internal quotation omitted).

The California Court of Appeal, however, declared that the jury in this case could have found "by clear and convincing evidence that [Ford] acted with fraud, malice or oppression" in manufacturing the popular 1997 Explorer 4x4 regardless of whether that vehicle complied with relevant government and industry safety standards. Pet. App. 43a, 46-50a. Indeed, the court gave *no weight whatsoever* to compliance with government and industry standards. According to the court, "'governmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products.'" *Id.* at 47a (quoting *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981)); *see also id.* ("'Punitive damages ... remain as the most effective remedy for consumer protection against defectively designed mass produced articles.'") (quoting *Grimshaw*, 119 Cal. App. 3d at 810).

The Court of Appeal thereby missed the point. There is no question, and Ford did not deny below, that States may impose liability for *compensatory* damages notwithstanding compliance with federal motor vehicle safety standards. *See* 49 U.S.C. § 30103(e) ("Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."). But that does not mean that States may *punish* motor vehicle manufacturers notwithstanding compliance with federal motor vehicle safety standards. To the contrary, as noted above, government safety standards provide objective guideposts of reasonable behavior, and compliance with such standards presumptively negates the requisite culpability for punitive damages. The California Court of Appeal thus started its analysis from the wrong presumption: rather than presuming that compliance with relevant government standards forecloses punitive damages, the court breezily dismissed compliance with relevant government standards as irrelevant to the analysis.

That approach cannot be squared with the Due Process Clause of the Federal Constitution. As this Court has recognized, that Clause limits the extent to which States may abrogate traditional legal protections from punishment. *See, e.g.*, *Oberg*, 512 U.S. at 430; *see also id.* at 436 (Scalia, J., concurring). Just as a State may not abrogate traditional judicial review of punitive damages awards, *see id.*, a State may not abrogate traditional limitations on the degree of culpability necessary to justify punitive damages.

At common law, punitive damages were strictly reserved for a narrow class of cases—torts involving "intentional and deliberate [misconduct], and ha[ving] the character of outrage frequently associated with crime." William Prosser, *Law of Torts* § 2, at 9; *see also Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 111 (1893) ("[C]riminal intent [is] necessary to warrant the imposition of [punitive] damages."), *id.* at 114 ("unlawful and criminal intent" required for punitive damages); *Smith v. Wade*, 461 U.S. 30, 78-79 n.12 (1983) (Rehnquist, J., dissenting) (describing the highly culpable state of mind required for punitive damages at common law). Accordingly, courts submitted the issue of punitive damages to a jury only in extraordinary cases, and appellate courts were not hesitant to reverse based on insufficient evidence of the requisite extreme culpability (even where the jury in fact had awarded punitive damages). *See, e.g.*, *Philadelphia, Wilmington & Baltimore R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 213-14 (1859) ("[T]he malice [necessary to sustain a punitive damages award] is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifferent to civil obligations.").

Where, as here, a defendant's challenged conduct complies with relevant government and industry safety standards, the defendant presumptively did not display the requisite extreme culpability necessary to justify

punishment. By refusing to give Ford's compliance with relevant government safety standards any weight in determining whether punitive damages were available here as a matter of law, the California Court of Appeal effectively drained the "fraud, malice or oppression standard" of meaning. It is one thing to say that California may compel Ford to compensate the plaintiff for her injuries; it is another thing altogether to say that California may punish Ford for manufacturing a motor vehicle that complied with relevant government and industry standards. Under federal law, "[t]he Secretary of Transportation shall prescribe motor vehicle safety standards" that "shall ... meet the need for motor vehicle safety." 49 U.S.C. § 30111. If the Secretary has concluded that a particular motor vehicle satisfies the safety standards enacted pursuant to this statutory mandate, it is hard to see how a manufacturer can be deemed to have acted with the requisite extreme culpability by concluding likewise, or how manufacturers were given constitutionally adequate notice that their conduct was subject to punishment.

Plaintiffs here allege that the 1997 Ford Explorer was defective in two interrelated respects. According to plaintiffs, the vehicle was insufficiently stable (and thus prone to rollover), and its roof was insufficiently strong (and thus prone to allow injuries in the event of a rollover). Plaintiffs' theory of defect encompasses *both* of these allegations—an insufficiently stable vehicle *per se* would not be defective, if the vehicle were otherwise strong enough to prevent injuries. *See, e.g.*, Pet. App. 13a ("The Wilsons presented evidence that rollovers are relatively nonviolent events for the occupants when they are properly restrained and there is minimal roof intrusion, and occupants are killed or disabled only when the roof crushes inward.").

With respect to roof strength, the California Court of Appeal did not deny that the 1997 Ford Explorer's roof met or exceeded the relevant federal safety standard,

Federal Motor Vehicle Safety Standard ("FMVSS") 216. *See* Pet. App. 49-50a. Rather, the court simply insisted that federal motor vehicle safety standards do not preempt state tort law. *See* Pet. App. 47-49a. But that is a non sequitur. As noted above, the issue here is not whether a State may impose *liability* for conduct that complies with relevant federal safety standards, but whether a State may *punish* a defendant for manufacturing a motor vehicle that complies with relevant safety standards. Under traditional common-law norms underlying federal due-process protection, it may not. *See, e.g., Brand v. Mazda Motor Corp.*, 978 F. Supp. 1382, 1394-95 (D. Kan. 1997); *Welch v. General Motors Corp.*, 949 F. Supp. 843, 844-46 (N.D. Ga. 1996); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 826 (Fla. 1986); *Miles*, 922 S.W.2d at 589-90 & n.7; *see also* Owen, *Problems*, 49 U. Chi. L. Rev. at 42 n.196.

With respect to vehicle stability, the California Court of Appeal asserted that "there are no federal standards for stability of vehicles." Pet. App. 49-50a. That assertion is disingenuous at best. The Federal Government carefully studied the issue for three decades and decided *not* to impose a federal safety standard, on the ground that any such standard would compromise a vehicle's safety in other ways. *See* 52 Fed. Reg. 49033, 49036 (Dec. 29, 1987). Thus, rather than imposing a rollover standard, the Federal Government since 1984 instead has required manufacturers to provide consumers with information and warnings on rollover risk. *See* 49 Fed. Reg. 20016 (May 11, 1984); *see also* 66 Fed. Reg. 3388, 3403 (January 12, 2001); 49 C.F.R. Part 575. And the Federal Government has specifically rejected the very stability tests on which plaintiffs relied below (the so-called "stability index test" and "Consumers Union test"). *See* 62 Fed. Reg. 40602, 40639 (July 29, 1997); 59 Fed. Reg. 33254, 33258-59 (June 28, 1994); 57 Fed. Reg. 242, 248 (Jan. 3, 1992); 61 Fed. Reg. 28550, 28553 (June 5, 1996); 53 Fed. Reg. 34866, 49037 (Sept. 8, 1988); 53 Fed.

Reg. 12218, 12219-20 (April 13, 1988). The decision to provide a warning and information on rollover risk, rather than a safety standard, thus represents a clear policy choice; contrary to the Court of Appeal's suggestion, this is not a situation involving a regulatory void, but rather a situation involving a deliberate regulatory choice.

Under these circumstances, the Court of Appeal's conclusion that an award of $55 million in punitive damages is warranted cannot withstand constitutional scrutiny. Given the Federal Government's conclusion that FMVSS 216 roof strength regulations and stability warnings and information were adequate to address the very "defects" that plaintiffs allege, Ford presumptively cannot be punished for complying with these safety standards. Indeed, allowing a defendant to be punished for conduct that complies with such standards would leave the financial future of the motor vehicle industry (and American business more generally) at the whim of individual juries. *See Liesener v. Weslo, Inc.*, 775 F. Supp. 857, 861-62 (D. Md. 1991) ("It would be intolerable to hold that a manufacturer must, to escape punitive damages, follow the path of timidity and greatest caution ... shaped by the most pro-plaintiff result possible, especially where the manufacturer's conduct conforms to widely-recognized industry standards."). As Maryland's highest court noted in a similar context:

> Punitive damage awards can only affect behavior if an actor is able to conform to established standards of conduct. If the standards are constantly changing, the actor may be unable to predict accurately the line that separates desirable from undesirable conduct. A potential defendant will either become too cautious, refusing to engage in socially beneficial behavior or will follow a course of behavior that imposes more harm on society than benefit.

Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 652 n.19 (Md. 1992) (internal quotations omitted).

It goes without saying that the American business community has an acute interest in preventing the arbitrary imposition of punitive damages based on conduct that complies with reasonable objective guideposts for appropriate behavior, including government and industry standards. At the end of the day, when a manufacturer relies "in good faith on the current state of the art in safety concerns, and on conclusions by the governmental agencies charged with administering safety regulations in the area of its product that the product is not unreasonably dangerous, it cannot be said to have acted with an entire want of care showing conscious indifference to the safety of product users." *Miles*, 922 S.W.2d at 589. Because the 1997 Ford Explorer complied with relevant governmental and industry standards, this Court should not allow the award of punitive damages here to stand.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547 (2000) 13, 17

W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107 (2001) 13

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 125 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983 PLAC has filed over 725 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.[1]

As part of the regular product-design process, PLAC's members must routinely analyze and resolve questions about safety. PLAC members who manufacture products with the potential to cause significant physical injury or death—including pharmaceuticals, medical devices, pesticides, foodstuffs, chemicals, appliances, power tools, and automobiles—

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

have a particular interest in the legal implications of product-design decisions.

By upholding punitive liability against a manufacturer without regard to objective indicators of reasonableness—*e.g.*, whether its design decisions conformed with industry custom, met government safety standards, or were supported by contemporaneous expert opinion—the California courts embraced a regime of post hoc second guessing under which manufacturers can never know in advance whether their design decisions will subject them to punishment. Such an approach not only deprives manufacturers of "fair notice * * * of the conduct that will subject [them] to punishment" (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)), but also "'mak[es] the law so arbitrary that [manufacturers] will be unable to avoid punishment based solely upon bias or whim'" (*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting))).

Moreover, in this era of expansive tort litigation against corporations and even entire industries, PLAC's members are required to defend against product-liability lawsuits seeking millions and sometimes billions of dollars in jury-imposed punitive damages. It has been PLAC's experience that, in such cases, the lower courts routinely have been misapplying and, indeed, effectively nullifying the three excessiveness guideposts identified by this Court in *BMW* and refined in *State Farm*. This Court's guidance as to the proper application of the *BMW/State Farm* guideposts in the product-liability context is desperately needed. In particular, the lower courts are misapplying the reprehensibility guidepost in the product-liability context. With few exceptions, reviewing courts in products cases have mechanically applied the five non-exclusive reprehensibility criteria identified in *State Farm* in a way that makes a finding that the conduct is highly reprehensible a virtual foregone conclusion. That surely is not what this Court intended when it articulated its

guideposts and when it thereafter provided lower courts with a list of factors to consider in gauging reprehensibility. The present case well illustrates the problem and would be an ideal vehicle for providing the lower courts with the necessary guidance.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the last sixteen years, this Court has addressed issues relating to the administration of punitive damages in seven cases—*Haslip*, *supra*; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *BMW*, *supra*; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm*, *supra*; and *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). In none of these cases, however, did the Court have occasion to evaluate a punitive award for excessiveness in the context of a product-liability claim. As a consequence, lower courts have lacked adequate guidance as to the proper application of the *BMW* guideposts in the product-liability context. Left to their own devices, they often have misapplied or refused outright to apply the guideposts, essentially on the ground that death (or serious personal injury) caused by an "intentionally" designed product is uniquely reprehensible.

Ironically, there is no other context in which it is more important to ensure that punitive damages are not applied arbitrarily and, when applied, do not exceed society's interest in rational deterrence. Products are the lifeblood of the American economy. Multimillion-dollar punitive awards rendered against manufacturers who have made good-faith design decisions and whose products meet and even exceed federal safety standards not only deprive product manufacturers of property without fair notice but have the inevitable effect of chilling innovation, encouraging excessive precautions, and increasing the price of products beyond the means of many potential purchasers.

PLAC submits, therefore, that it is vitally important for the Court to grant review in a product-liability case to supply needed guidance as to the proper excessiveness inquiry in this context. In the event that the Court does not vacate and remand for further consideration in light of *Philip Morris*, this case is an ideal vehicle for explaining the criteria that should be considered in assessing the reprehensibility of product-design decisions that later have been determined by a jury to have resulted in a defective product.

It also presents the Court with an opportunity to address, for the first time, the limitations that the Due Process Clause imposes on the adjudication of punitive liability, not just the amount of punitive damages.

ARGUMENT

It has become increasingly common that when a plaintiff is tragically injured or killed and a jury determines that a product is defective it also finds that the manufacturer acted reprehensibly and awards the injured plaintiff not just full compensation for her injuries (compensation that often includes a large punitive element in the form of increasingly large non-economic damages) but also an astounding windfall in punitive damages.

These penalties have ranged from a $4.8 billion punitive award (reduced by the trial court to $1.09 billion) in a case alleging that General Motors defectively designed its gas tanks by placing them behind instead of above the rear axle to the $246 million punitive verdict in this case (reduced by the courts below to $55 million) to $12.5 million for the alleged defective design of a seatbelt that had never failed in over twenty years to a $1 million penalty in the case of a fishbowl that shattered while being carried.

It is particularly disturbing that courts have allowed punitive verdicts to stand in many cases (including this one), despite compelling evidence that the product's design was objectively reasonable, simply because the manufacturer

knew that its product posed a risk of injury to consumers. For inherently dangerous products, however, such knowledge is not a sign of conduct that must be punished and deterred, but of the socially responsible cost-benefit calculus that we expect manufacturers to employ when making design decisions.

Moreover, it defies common sense to suggest that every product-liability case in which there is sufficient evidence to support some amount of punitive damages is one in which a penalty of millions or tens of millions of dollars is required to serve society's interest in punishment and deterrence. See *BMW*, 517 U.S. at 580 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award.").

I. The Court Should Grant Review To Confirm That The Due Process Clause Prohibits States From Imposing Punitive Damages On A Product Manufacturer In The Absence Of Objective Criteria For Evaluating The Manufacturer's Conduct.

This Court repeatedly has stated that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice … of the severity of the penalty that a State may impose'" and "threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but 'a decisionmaker's caprice.'" *Philip Morris*, 127 S. Ct. at 1062 (citing *BMW* and *State Farm*). Accordingly, "this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" *Ibid.* By the same logic, a State that fails to appropriately cabin the jury's discretion deprives a defendant of fair notice of the conduct that will expose the defendant to punitive liability in the first place.

The imposition of punitive liability without adequate notice, just like the imposition of an overly large punitive award without adequate notice, is a violation of the defendant's due process rights. *BMW*, 517 U.S. at 574 ("[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment"); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966) ("a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits"). Indeed, regardless of the size of the award, the imposition of punitive liability alone can have significant negative effects on a defendant. That is particularly true in the product-liability context where an award of punitive damages can give rise to "'indirect' costs that manufacturers appear to take very seriously, such as publicity about litigation that may damage the company's reputation or trigger additional lawsuits, reactions of consumers that could reduce product demand, and reactions of safety regulators such as investigations, product recalls, or stricter regulations." Steven Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis: A Problem Without a Solution?*, 52 STAN. L. REV. 1809, 1814 (2000); see also *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) ("[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards."); *Masaki v. General Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989) (punitive damages "can stigmatize the defendant in much the same way as a criminal conviction" and therefore "can be onerous when loosely assessed").

Because the imposition of punitive liability can be so harmful for a manufacturer and because the design and manufacture of products play such a critical role in the health

of our national economy, it is particularly important that the law provide clear guidance to manufacturers on how they are to design their products so as to avoid these sanctions. It is ironic, then, that the law provides almost no guidance in this context and allows the imposition of punitive liability based on the most arbitrary and post hoc considerations. This case, in which the reviewing court allowed the punitive verdict to stand despite the presence of several objective indicia of the reasonableness of Ford's design decision, provides a perfect opportunity for this Court to take up these issues.

Any rational punitive damages regime must begin with the fact that no product is completely safe. Neither are manufacturers required to design the safest product possible. See generally RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2 cmt. a (1998) ("Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved."). Instead, the process of product design necessarily involves complex cost-benefit decisions. When deciding whether to implement a particular design feature, a manufacturer must consider many factors: the types of risks that the feature guards against (including their severity and likelihood); the feature's relative effectiveness at avoiding those risks as compared to alternative features; any risks that the feature might create or exacerbate (including their severity and likelihood); the relative benefits and costs of the feature with respect to other design considerations such as performance, efficiency, marketability, appearance, ease of operation, durability, freedom from maintenance or repair, and ease of manufacture; and, finally, the relative cost to consumers of the feature and its alternatives. The task of a

responsible manufacturer is to strike a reasonable balance between these often countervailing considerations.[2]

A manufacturer that conducts this cost-benefit calculus for an inherently dangerous product always can be charged with "knowingly" designing a product that poses certain risks to consumers. Indeed, the more transparent and comprehensive the manufacturer's analysis, the more that the manufacturer opens itself up to such charges. And when trying to strike an appropriate balance in the design of a complex, inherently dangerous product such as an automobile, a manufacturer inevitably confronts disagreement among experts about the benefits and relative costs of proposed safety features. In such contexts, the manufacturer is forced to make a decision with imperfect, often conflicting information.

This cost-benefit analysis, and the sometimes controversial design decisions that it entails, is an unavoidable component of the product-design process. Thus, when a manufacturer's "knowledge" that its product poses risks to consumers or its choice between competing opinions about a particular safety feature (*i.e.*, its "rejection" of some experts' opinions) is sufficient to sustain a punitive award—as has become true in an increasing number of product-liability cases—the law effectively provides no guidance on how a manufacturer can avoid such liability. If the law is to give manufacturers an opportunity to design their products so as to avoid punitive damages, then punitive liability must take account of other factors such as whether the product meets government safety standards, complies with industry custom, and contains de-

[2] The situation is different when a particular design violates a governing safety standard, such as a federal regulation. But in most product-liability cases where punitive damages are imposed, including this one, there is no claim that the manufacturer violated a statutory or regulatory design or performance standard. On the contrary, breathtaking punitive awards are regularly imposed for products that satisfy extensive and detailed government regulations.

sign elements that are endorsed by contemporaneous expert opinion at the time of the design.

Some courts already recognize the necessity for such criteria. In particular, many courts have recognized that punitive liability is inappropriate in situations where the manufacturer has made a design decision that was supported by contemporaneous expert opinion, even though the manufacturer "knew" that other experts thought that their design created an unreasonable risk of injury.[3]

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[3] See, *e.g.*, *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 618 (Iowa 2000) (concluding that, where there was reasonable disagreement among experts about adequacy of product design and testing, rational jury could not find defendant liable for punitive damages even though it could reasonably find liability on plaintiff's underlying tort claims); *Loitz v. Remington Arms Co.*, 563 N.E.2d 397, 407 (Ill. 1990) (reversing punitive award in part because there was a good-faith disagreement among metallurgical experts regarding the safety of the material used in making the gun barrel that exploded, causing plaintiff's injury); *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (affirming j.n.o.v. on punitive damages because "an award of punitive damages is inappropriate where room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue"); *Owens-Corning Fiberglas Corp. v. Garrett*, 682 A.2d 1143, 1163-1165, 1167-1168 (Md. 1996) (reversing punitive award in part because there was a genuine scientific dispute regarding the safety of the product at issue); *Satcher* v. *Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive award in part because "there is a genuine dispute in the scientific community as to whether leg guards do more harm than good"); *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) (reversing denial of j.n.o.v. because "[a]n award of punitive damages is not appropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct at issue"); see generally David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 38 (1982).

Nevertheless, the court below rejected reliance on contemporaneous expert opinion as a factor to be considered when deciding whether a punitive verdict can stand.[4] Pet. App. 44a-46a. Similarly, it refused to consider compliance with government safety standards and industry custom and practice as relevant factors. Pet. App. 46a-50a. The resulting punitive damages regime is one in which product manufacturers have no means of ensuring that their design decisions do not expose them to liability for punitive damages.

In other words, even when a manufacturer has adopted a product design that is recommended by contemporaneous expert opinion, that meets or exceeds all government safety standards, and that performs as well as or better than other similar products on the market, the threat of an enormous punitive exaction still will hang over the manufacturer's head. In that situation, the criteria that determine whether the manufacturer is subjected to punitive liability in a particular case have nothing to do with the actual objective reasonableness of the manufacturer's design. Punitive liability instead turns on arbitrary factors such as whether this plaintiff is more sympathetic than the last eleven to bring similar claims or whether this plaintiff's lawyer has learned the lesson of the last eleven cases and finally perfected the right rhetorical tactic to incite a jury to outrage over the product at issue.

This Court's guidance on the appropriate criteria to be considered before imposing punitive liability in the product-liability context is urgently required to give manufacturers fair notice of how they may design products responsibly

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[4] The court seemed to misunderstand the nature of the argument being made, construing it as an attempt to avoid liability any time that a defendant puts on expert testimony at trial that its design was reasonable. On the contrary, the point has nothing to do with the *ex post* analysis offered by experts at trial, but addresses the situation that confronts a manufacturer when there is a genuine dispute among experts at the time that design decisions are being made.

without risking the stigmatizing burden of punitive liability and the debilitating costs of exorbitant punitive awards.

II. The Court Should Grant Review In Order To Provide Necessary Guidance On The Proper Application Of The *BMW/State Farm* Guideposts In Product-Liability Cases.

In addition to presenting squarely the punitive liability issue, the present case would be an ideal vehicle for providing the lower courts with needed guidance on the proper application of the *BMW/State Farm* guideposts in the product-liability context. Although the lower courts have consistently misapplied the ratio and comparable-penalties guideposts in product cases (ignoring this Court's guidance about a 1:1 ratio often being the constitutional maximum when compensatory damages are "substantial" and either ignoring or giving minimal weight to the relevant NHTSA and CPSA fines), we focus here on the pressing need for guidance about the reprehensibility guidepost.

The degree of reprehensibility of the defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575. But it also is the guidepost that is most susceptible to misapplication in a product-liability action. The linchpin of this guidepost is "the accepted view that some wrongs are more blameworthy than others." *Ibid.* Accordingly, when analyzing a punitive award for excessiveness, a reviewing court must locate the defendant's conduct on a spectrum of reprehensibility, with a "high degree of culpability" being necessary to sustain "a substantial punitive damages award" (*id.* at 580).

But reviewing courts have gone astray in the product-liability context, treating all product-liability cases as if they fall on the high end of the reprehensibility spectrum merely because they involve physical harm, the design decisions at issue are "intentional" rather than "accidental," and the jury

necessarily found reckless disregard for safety as part of its threshold decision to impose punitive liability In other words, three of the five reprehensibility factors identified in *State Farm* are treated as present automatically in all product-liability cases in which punitive damages are imposed.[5] This systematic bias, which has resulted in eye-popping exactions regularly being upheld in product-liability cases, is an unfortunate result of the fact that this Court's guidance on applying the reprehensibility guidepost has come exclusively in the context of traditional economic torts.

Product-liability claims are unique in many ways. Unlike most other classes of torts, product-liability claims involve physical injuries or death as a matter of course. Moreover, although companies that design and manufacture products are the heart of the American economy, when a jury looks through the virtually inescapable lens of hindsight at a tragically injured plaintiff on the one hand and a large corporate defendant on the other, it easily is provoked to a state of outrage that leads it to award astounding sums in punitive damages irrespective of the true culpability of the manufacturer's conduct or the actual need for punishment and deterrence. As Judge Easterbrook has explained:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [complex products] to minimize the sum of construction, operation, and injury costs. * * *

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[5] In addition, several courts have held that the other two factors are met too because the plaintiff invariably is financially vulnerable vis-à-vis the defendant manufacturer and the design decision necessarily results in thousands of consumers being exposed to the same alleged defect. See, *e.g.*, *Udac* v. *Takata Corp.*, Civil No. 02-1-0260, slip op. at 3 (Haw. Cir. Ct. Jul. 20, 2006); *White* v. *Ford Motor Co.*, CV-N-95-0279-DWH, slip op. at 35-37 (D. Nev. Mar. 14, 2005); *Romo* v. *Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 806 (Cal. Ct. App. 2003).

> Come the lawsuit, however, the [plaintiff] injured by [the product] presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured [by an alternative design] are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. * * * [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by [consumers] (and stockholders) in other states.

Carroll v. *Otis Elevator Co.*, 896 F.2d 210, 216 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted); see also W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001) (in the jury's mind, a manufacturer's "superior *ex ante* risk judgments may be outweighed by the *ex post* reality of the accident victim").

This hindsight bias is compounded substantially when the plaintiff is able to shine a spotlight on the *ex ante* cost-benefit aspect of the product-design process and argue that, by considering the costs of various design alternatives, including the costs of potential accidents such as that suffered by the plaintiff, the defendant "traded lives for dollars." See W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 552 (2000) (mock juror study revealed that even proper corporate balancing of risks against costs incited jurors to award inflated punitive damages awards); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, *supra*, 49 U. CHI. L. REV. at 11. This turns on its head the first principle of product-liability law—that because most products entail some risk of harm, the task of a responsible manufacturer is to

strike a reasonable balance between safety and a host of other considerations, including "marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor." Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 88-89 (1985).

As this Court has recognized, appellate review plays a critical role in filtering out these inevitable aspects of juror bias and helping to ensure that punitive awards comport with the requirements of due process. See *Haslip*, 499 U.S. at 21 ("appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"). But when appellate courts evaluating reprehensibility make precisely the same errors that infected the underlying jury verdicts, their "review" does nothing to ameliorate the constitutional violations.

The present case is illustrative. Nominally applying the reprehensibility guidepost, the court below found that "the reprehensibility of Ford's conduct was high, given the catastrophic nature of Mrs. Wilson's injuries, Ford's reckless disregard for the safety of others, the repeated nature of Ford's conduct, and the fact that Ford's acts were intentional." Pet. App. 55a. In other words, the court held that Ford's conduct was at the extreme high end of the reprehensibility spectrum merely because (a) Ford knowingly (*i.e.*, intentionally) mass produced a product that entailed some risk of harm (although the product also was useful and highly desirable to consumers), and (b) an accident involving that product resulted in "catastrophic" injuries.

Of course, that does not distinguish this case from any number of other product-liability cases. Most manufacturers know that their products pose some risk of harm to consumers. And it is inevitable that the use of certain types of products at some point will result in serious injury or death. The

factors identified by the court here as supporting a finding of high reprehensibility—the "intentional" design of a mass-produced product that poses some risk of injury and that caused serious injury—are not indicative of particularly reprehensible conduct, but are simply the same factors that are found in every run-of-the-mine product-liability case.

Thus, to distinguish truly reprehensible conduct by a manufacturer from conduct that, although perhaps deserving punishment, falls lower on the reprehensibility spectrum, a reviewing court must look to other objective criteria that were not among the five factors identified in *State Farm*, but which are far more relevant to the inquiry in this category of cases. In particular, courts should consider whether the product design complied with government safety standards, whether it conformed to industry custom and standards, and whether the manufacturer's design choice was supported by contemporaneous expert analysis regarding the safety features at issue and relevant alternative designs.[6]

These factors, as opposed to those relied upon by the court below, actually serve to distinguish between more and less reprehensible conduct. For example, a manufacturer that knowingly designs and markets a product that fails to meet government safety standards might reasonably be judged to have acted more reprehensibly than a manufacturer whose product met or exceeded all government safety standards but nevertheless caused equally severe injuries to a plaintiff. The latter manufacturer has demonstrated a respect for societal judgments about risk tolerance that the former did not.

[6] As we contended above, if established, compliance with government standards, conformity with industry custom and standards, and the existence of contemporaneous expert support for the design decision should negate punitive liability altogether. But if the Court disagrees—or if the factors point in opposite directions—then these factors should be considered in the reprehensibility analysis, along with remedial efforts and any other factors that may be relevant.

Similarly, a manufacturer that rejects the consensus opinion of relevant experts as to a particular safety feature when designing its product might reasonably be judged to have acted more reprehensibly than a manufacturer that chooses between experts with competing opinions on a particular safety feature. Even if, in retrospect, the latter manufacturer made the wrong choice, its design decision did not display the same disregard for existing learning on safety issues as the decision of the former manufacturer.

Here, the reviewing court refused to take such factors into account, and instead found that Ford's conduct fell on the extreme high end of the reprehensibility spectrum because it entailed the features that are common to all product-liability cases. In so doing, the court effectively created a *per se* rule of extreme reprehensibility for product liability, rendering *BMW*'s reprehensibility guidepost—originally developed in the context of traditional economic torts—impotent to distinguish among more and less reprehensible conduct in the product-liability context.

One aspect of the analysis below is a particularly good illustration of the problem. The court found that Ford's conduct satisfied the fifth reprehensibility factor, "intentional harm," because "Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management, knowing the unreasonable risk of harm posed to consumers." Pet. App. 57a. By equating the product-design process for inherently dangerous products like automobiles with an intention to harm consumers, the court deprived the reprehensibility guidepost of any constraining force in the product-liability context. As one commentator has explained, design defect cases inevitably involve "'conscious design choice[s]' * * * implicat[ing] a manufacturer's decisionmaking process concerning risk-utility"; "[u]nlike the standard negligence case of yesteryear, the modern products liability case comes with 'intent' built in." Aaron D. Twerski, *Punitive Dam-*

ages: Through the Five Prisms, 39 VILL. L. REV. 353, 356 (1994).

When this "built in" intentionality is imported into the reprehensibility analysis, it ensures that any attempt by a manufacturer to "think about risks in a systematic manner and to undertake [cost-benefit] calculations to ensure that there is appropriate risk balancing that is sufficiently protective" of all interests (Viscusi, *Corporate Risk Analysis*, *supra*, 52 STAN. L. REV. at 550) will be seen, not as a socially responsible aspect of product design, but as egregious misconduct justifying severe punishment under *BMW*. And far from encouraging an open and thorough consideration of product safety, the resulting punitive awards will deter such socially responsible behavior or at least force manufacturers to limit the scope and transparency of their cost-benefit analysis. See, *e.g.*, Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis*, *supra*, 52 STAN. L. REV. at 1814 ("[T]he perceived likelihood and potential costs associated with punitive damages for performing risk or benefit-cost analyses can be large enough to attract attention by corporate decision makers and deter them from doing such analyses.").

Unfortunately, the court of appeal's simplistic equation of knowledge that a product can cause physical injury or death with high reprehensibility is not unprecedented. On the contrary, manufacturers now face a legal climate in which knowledge that someone could be injured while using a product—a fact common to virtually every product-liability case—creates a very real risk that, when someone inevitably is injured while using the product, the manufacturer will be mulcted with an astronomical punitive exaction for "intentionally" and "repeatedly" selling a product that could cause severe injuries.

The history of Ford Explorer litigation well demonstrates this serious problem. As petitioner indicates (Pet. 7), Ford was exonerated in the first eleven cases to go to judgment on

the claims raised by the respondent, and several juries expressly found that the Explorer was not defectively designed. In this, the twelfth case, a jury, for the first time, concluded that the design of the Explorer was defective and proceeded to impose punitive damages. In finding the conduct to be highly reprehensible merely because the design decision was an intentional one, and then allowing $55 million of punitive damages on top of an only slightly less staggering $27.6 million in compensatory damages, the court of appeal nullified all of Ford's prior victories. This is troubling not only because it is unfair to Ford, but also because it is bound to happen to other manufacturers as well. So long as there is at least one pot of gold at the end of the rainbow, plaintiffs' lawyers will continue to bring punitive-damages claims against manufacturers no matter how many prior exonerations those manufacturers have obtained. *Cf. Philip Morris*, 127 S. Ct. at 1062 (recognizing that "where the amounts [of punitive damages] are sufficiently large," there is a risk of "impos[ing] one State's (or one jury's) policy choice, say as to the conditions under which (or even whether) certain products can be sold, upon neighboring States with different public policies") (internal quotation marks omitted).

Just as "it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance" (*id.* at 1064), so too is it critical for this Court to provide lower courts with clear guidance as to the proper application of the reprehensibility guidepost in the product-liability context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M
A.O. Smith Corporation
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation

The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont de Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global, Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Magna International Inc.

Mazda (North America), Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation

Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

(This list is current as of March 8, 2007)